



BRB Nos. 22-0389 BLA and  
22-0389 BLA-A

DEBORAH A. LEAVELLE )  
(Widow of GLEN W. LEAVELLE) )

Claimant-Petitioner )  
Cross-Respondent )

v. )

REITZ COAL COMPANY )

and )

DATE ISSUED: 9/20/2023

OLD REPUBLIC INSURANCE COMPANY )

Employer/Carrier- )  
Respondents )  
Cross-Petitioners )

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

Party-in-Interest )

DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of  
Drew A. Swank, Administrative Law Judge, United States Department of  
Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long),  
Ebensburg, Pennsylvania, for Claimant.

Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for  
Employer and its Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2021-BLA-05069) rendered on a survivor's claim filed on December 2, 2019,<sup>1</sup> pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that the Miner had nine years of coal mine employment. Because the Miner had less than fifteen years of coal mine employment, Claimant could not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).<sup>2</sup> Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the Miner had legal pneumoconiosis<sup>3</sup> but did not establish he had clinical pneumoconiosis<sup>4</sup> or that his death was due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). Thus he denied benefits.

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<sup>1</sup> Claimant is the widow of the Miner, who died on June 8, 2019. Director's Exhibits 2, 11.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and was totally disabled by a respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

<sup>3</sup> "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).

<sup>4</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 fibrotic reaction of the lung

On appeal, Claimant argues the ALJ erred in finding she failed to establish the Miner's death was due to legal pneumoconiosis. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to remand the case for the ALJ to reevaluate whether the Miner's death was due to pneumoconiosis. On cross-appeal, Employer argues the ALJ erred in finding Claimant established the Miner had legal pneumoconiosis. Claimant responds in support of the ALJ's finding of legal pneumoconiosis. The Director declined to respond to the cross-appeal unless requested to do so.<sup>5</sup>

The 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>6</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).

In a survivor's claim where no presumptions are invoked, the claimant must establish the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis was a direct cause of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989). Failure to establish any one of the requisite elements of entitlement precludes an award of benefits. *See Trumbo*, 17 BLR at 1-87-88.

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tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

<sup>5</sup> We affirm, as unchallenged on appeal, the ALJ's findings that the Miner had nine years of coal mine employment and the evidence does not establish clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.202; Decision and Order at 3.

<sup>6</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4, Claimant's Exhibit 3 at 16-17.

## Legal Pneumoconiosis

We first address Employer's cross-appeal argument. To establish legal pneumoconiosis, Claimant must demonstrate the Miner had 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), 718.202(a).

The ALJ found the Miner's treatment records and death certificate establish he had chronic obstructive pulmonary disease (COPD) and emphysema based on the repeated diagnoses of these conditions in the Miner's medical history. Decision and Order at 12; Director's Exhibits 11, 13, 14; Employer's Exhibits 6-10. We agree with Employer's argument that the ALJ erred in finding the treatment records establish the Miner had COPD and emphysema based solely on the diagnoses contained within the records. Employer's Cross-Appeal Brief at 12. Pursuant to 20 C.F.R. §718.104(d)(5), the weight to give a treating physician's opinion "shall . . . be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade"). The ALJ did not consider the credibility and reasoning of the treatment records and thus failed to render a necessary factual finding. *See Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Employer also correctly asserts the ALJ's only rationale for finding Claimant met her burden of establishing the Miner had legal pneumoconiosis is that "[t]he *Preamble* to the regulations links COPD to coal mine dust exposure." Decision and Order at 12, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The ALJ's analysis and conclusion appears to conclude, erroneously, that the Miner's COPD consequently must be attributable to coal mine dust inhalation and therefore the Miner's COPD constitutes legal pneumoconiosis. *Id.*; *see* Employer's Cross-Appeal Brief at 11. Contrary to the ALJ's finding, whether a particular miner's COPD is due to coal mine dust exposure must be determined on a case-by-case basis based on his consideration of the evidence, *see* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002). Thus, we agree with Employer's argument that the ALJ erred in misstating the import of the preamble to the revised 2001 regulations and in summarily concluding that because the Miner had COPD, Claimant established legal pneumoconiosis. Decision and Order at 12; Employer's Cross-Appeal Brief at 11.

The ALJ also weighed Dr. Basheda's contrary opinion. Dr. Basheda opined the Miner did not have legal pneumoconiosis, in part, because pulmonary function testing is not indicative of an obstructive respiratory impairment. Employer's Exhibits 3, 5. Thus

he opined the Miner had no lung disease. *Id.* The ALJ discredited his opinion because it is undermined by the Miner's treatment records "that consistently refer to a diagnosis of" COPD. Decision and Order at 12. However, as discussed above, we have vacated the ALJ's finding that the treatment records establish the Miner had COPD. Thus we vacate the ALJ's rationale for discrediting Dr. Basheda's opinion on legal pneumoconiosis. *See Wensel*, 888 F.2d at 17.

We also hold the ALJ erred by failing to weigh Dr. Rosenberg's opinion that the Miner did not have legal pneumoconiosis. Employer's Exhibits 2, 4. While the ALJ summarized Dr. Rosenberg's opinion, he made no determination as to its credibility and therefore his legal pneumoconiosis finding does not satisfy the Administrative Procedure Act (APA).<sup>7</sup> 5 U.S.C. §557(c)(3)(A); *Wensel*, 888 F.2d at 17; *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal bases for his decision); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune*, 6 BLR at 1-998 (fact finder's failure to discuss relevant evidence requires remand). Thus we vacate the ALJ's finding that Claimant established legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.202(a); Decision and Order at 12.

### **Death Due to Pneumoconiosis**

We next address Claimant's argument that the ALJ erred in finding she failed to establish the Miner's death was due to legal pneumoconiosis. With respect to the cause of the Miner's death, the ALJ considered the Miner's death certificate, which Dr. Sabario completed.<sup>8</sup> Director's Exhibit 11. Dr. Sabario noted an autopsy was not performed on the Miner. *Id.* He stated the Miner died as a result of acute respiratory failure due to the consequences of "severe" COPD and "occupational pneumoconiosis." *Id.* The ALJ discredited the death certificate because there is "no indication that the individual signing

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<sup>7</sup> The Administrative Procedure Act provides 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).

<sup>8</sup> Drs. Rosenberg and Basheda opined the Miner's death was unrelated to legal pneumoconiosis. Employer's Exhibits 2-5. The ALJ discredited the doctors' opinions on the issue of death causation because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that the Miner had the disease. Decision and Order at 16. Because the ALJ erred in finding the Miner had legal pneumoconiosis, we vacate the ALJ's credibility findings with respect to Drs. Rosenberg and Basheda on the issue of death causation.

the death certificate possessed any relevant qualifications or personal knowledge of the [M]iner upon which to assess the cause of death.” Decision and Order at 14-15.

As Claimant and the Director correctly argue, the ALJ erred in finding Dr Sabario had no “personal knowledge” of the Miner’s health condition at the time of his death.<sup>9</sup> Claimant’s Brief at 5-7; Director’s Brief at 2-3. Specifically, the ALJ erred by failing to consider the Miner’s treatment records which reference Dr. Sabario’s evaluation of the Miner in the weeks leading to his death. Director’s Exhibits 11, 13, 14; Employer’s Exhibits 6-10. Because the ALJ failed to consider this relevant evidence when discrediting the death certificate, we vacate the ALJ’s credibility finding. *Wensel*, 888 F.2d at 17; *Rowe*, 710 F.2d at 254-55; *McCune*, 6 BLR at 1-998; Decision and Order at 14-15. Thus we vacate the ALJ’s finding that Claimant failed to establish death causation. 20 C.F.R. §718.205; Decision and Order at 14-15.

### **Remand Instructions**

On remand, the ALJ should reconsider whether Claimant has established legal pneumoconiosis and death due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). In reconsidering the medical opinions, the Miner’s death certificate, and his treatment records, the ALJ should take into account the physicians’ qualifications, the explanations of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses, and he must explain his findings. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). In reaching his credibility determinations, the ALJ must set forth his findings in detail and explain his rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

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<sup>9</sup> We also agree with the Director’s argument that the ALJ erred in finding Claimant cannot establish death due to pneumoconiosis through a death certificate if the record does not include the “relevant qualifications” of the physician who signed the document. Decision and Order at 14-15; *see* Director’s Brief at 2-3. The ALJ has not explained what qualifications are necessary for a doctor to address the cause of the Miner’s death. *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Sea “B” Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). None of the cases the ALJ cited in the course of his discussion hold that a doctor who opines on the cause of a Miner’s death must have specific qualifications. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186 (4th Cir. 2000); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge