



**RECENT SIGNIFICANT BLACK LUNG BENEFITS ACT DECISIONS
October 2015**

Stephen R. Henley
Chief Judge

William S. Colwell
Associate Chief Judge for Black Lung

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A. Circuit Courts of Appeals

In [*Coastal Coal-WV, LLC v. Director \[Miller\]*, Fed. Appx. , 2015 WL 5780674 \(4th Cir. Oct. 5, 2015\) \(unpub.\)](#), the court addressed Employer’s request for rehearing of the court’s earlier decision dismissing Employer’s petition for review as untimely. Contrary to its earlier opinion, the court concluded that, because Employer timely filed a motion for reconsideration of the Board’s Decision and Order affirming the ALJ’s award, Employer’s petition for review was properly before the court.

Concerning the merits of Employer’s appeal, the court agreed with Employer that the ALJ erred in failing to consider the comments its doctors provided on their x-ray interpretations concerning the existence of complicated pneumoconiosis. The court concluded “that the ALJ erred by failing to consider the physicians’ comments, as those comments have direct bearing on whether the mass appearing on the x-ray is in fact the manifestation of a chronic dust disease or is the result of some other disease process.” Because the ALJ primarily relied on the interpretations of these physicians in finding that the irrebuttable presumption of complicated pneumoconiosis was applicable, without also considering the attendant comments and how those comments might affect the credibility of the doctors’ readings, the court concluded “that substantial evidence does not support the award of benefits.”

In light of the above, the court vacated the award of benefits and remanded the matter to the ALJ “for reconsideration of the x-ray evidence of complicated pneumoconiosis.” The court noted that, “[i]f the ALJ again finds that the x-ray evidence establishes the existence of complicated pneumoconiosis, he should then weigh all of the evidence to determine whether Employer provided affirmative evidence showing that the opacity does not exist or was caused by another disease process.”

[Use of the official ILO form, generally: no bias, alternative versus additional diagnosis]

B. Benefits Review Board

In [Ross v. Consolidation Coal Co./Consol Energy, Inc., BRB No. 15-0007 BLA \(Oct. 20, 2015\) \(unpub.\)](#), which involved a miner's claim arising out of the Seventh Circuit, the ALJ found that Claimant failed to establish the existence of (1) a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), or (2) complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the ALJ denied benefits

Claimant appealed the denial. Before the Benefits Review Board, Claimant argued that the ALJ erred in his weighing of the evidence at total disability. Employer responded in support of the denial. The Director also responded, contending the ALJ "conflated the issues of total disability and disability causation, and erred in weighing the medical opinion evidence." Therefore, the Director requested that the Board vacate the ALJ's denial of benefits and remand the matter for further consideration.

Below, the ALJ initially determined that the pulmonary function study (PFS) evidence did not support a finding of total disability, while the arterial blood gas study (ABG) evidence did support such a finding. After noting that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record, the ALJ addressed the medical opinions of Drs. Tazbaz, Tuteur, and Selby. Dr. Tazbaz opined that Claimant suffers from "a moderately severe obstructive impairment" and hypoxemia, based on Claimant's PFS and exercise ABG results. In light of these impairments, Dr. Tazbaz opined that Claimant "cannot do his activities in [his] last year of employment." Dr. Tuteur opined that Claimant's PFS results showed that he suffers from "a minimal abnormality and some air trapping." However, Dr. Tuteur did not believe that these results were "clinical[ly] meaningful" or were associated with disability or reduced lung function. Dr. Tuteur opined that, while Claimant's worsening DA-aO₂ gradient and oxygen tension based on the ABG testing was a "substantial finding" and demonstrated an intracardiac shunt "consistent with complications of coronary artery disease, myocardial infarctions, surgical treatment and their sequelae," Claimant does not have a pulmonary problem. Instead, Dr. Tuteur opined that Claimant is totally disabled as a result of advanced coronary artery disease. Finally, Dr. Selby agreed with Dr. Tuteur in opining "that [C]laimant is not totally disabled from a respiratory standpoint," and instead attributed Claimant's drop in PO₂ to a cardiac problem.

In weighing the medical opinion evidence, the ALJ concluded that only Dr. Tazbaz believed that Claimant is totally disabled from a pulmonary perspective, while Drs. Tuteur and Selby believed that Claimant does not suffer from a pulmonary impairment that prevents him from performing his usually coal mine employment (CME). The ALJ gave less weight to Dr. Tazbaz's opinion, as he found that the physician did not "consider [C]laimant's severe cardiac issues as a potential cause of impairment and that the opinion was based solely on the doctor's own test results." The ALJ further found the opinion not well-documented.

In contrast, the ALJ gave "great weight" to the opinions of Drs. Tuteur and Selby. The ALJ was persuaded by Dr. Tuteur's opinion, as supported by that of Dr. Selby, that "[C]laimant's hypoxemia and blood gas results are 'most likely due to a right to left intracardiac shunt . . . consistent with complications of the coronary artery disease, myocardial infarctions, surgical treatment and their

sequelae.” Dr. Tuteur opined that “[C]laimant’s blood is bypassing/shunting the lungs’ due to a cardiac defect.” The ALJ found the opinions of Drs. Tuteur and Selby to be well-reasoned and well-documented. Accordingly, he concluded that the medical opinion evidence failed to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In weighing all of the relevant evidence together at 20 C.F.R. §718.204(b)(2), the ALJ found that, despite the qualifying ABG evidence, Claimant failed to establish that he has a totally disabling respiratory or pulmonary impairment.

The Board agreed with the Director that the ALJ improperly combined his analysis of the issues of total disability and disability causation. In support, the Board noted that the cause of Claimant’s totally disabling hypoxemia, which was manifested by his qualifying ABGs post-exercise, is properly considered either at disability causation or at the second prong of rebuttal pursuant to Section 718.305(d)(1)(ii). In addition, the Board concluded that the ALJ mischaracterized Dr. Tazbaz’s opinion and erred in finding his opinion to be “not sufficiently documented” because of his reliance on his own results from Claimant’s physical examination. Finally, the Board concluded that the ALJ did not sufficiently explain how the reports from Drs. Selby and Tuteur were better supported by the medical evidence of record.

In light of the above, the Board vacated the ALJ’s finding that the medical opinion evidence was insufficient to establish total disability and, therefore, his finding that the evidence as whole did not establish total disability. Accordingly, the Board remanded the matter for further consideration.

[Establishing total disability]

In [*Mays v. Bell County Coal Corp.*, BRB No. 15-0023 BLA \(Oct. 29, 2015\) \(unpub.\)](#), which involved a subsequent claim arising out of the Sixth Circuit, the ALJ found that Claimant established a change in an applicable condition of entitlement by proving the existence of both clinical and legal pneumoconiosis. The ALJ further found Claimant established that he is totally disabled due to pneumoconiosis arising out of his CME. The ALJ therefore awarded benefits. Employer moved for reconsideration, which an ALJ newly assigned to the case denied.

On appeal before the Board, Employer contended that the ALJ erred in finding it to be the responsible operator (RO). Furthermore, Employer argued the ALJ erred in finding that Claimant established the existence of clinical and legal pneumoconiosis, and thereby a change in condition, and in finding that Claimant is totally disabled due to pneumoconiosis.

The Board initially addressed Employer’s contention that it was not the operator that last employed Claimant for at least one year because Claimant was self-employed as a coal truck driver for at least a year following his work with Employer. The Board noted that the District Director designated Employer “as the [RO] because claimant’s only employment after leaving [Employer] was as an uninsured, self-employed coal truck driver.” Furthermore, the District Director noted that a self-employed coal truck driver is not required to obtain insurance, Claimant did not obtain such insurance, and Claimant “cannot be required to pay his own benefits should he be found eligible to receive

benefits.” The Board noted that the ALJ found no evidence that Claimant “would be capable of paying benefits.” The Board concluded that the District Director “investigated whether [C]laimant was covered by black lung insurance,” and that, as a coal transportation employer, Claimant was under no obligation to purchase insurance or qualify as a self-insurer. The Board concluded that Employer failed to establish, pursuant to Section 725.495(c), that Claimant was able to assume liability to pay his own benefits. Therefore, the Board affirmed the ALJ’s finding that Employer was the RO.

Turning to the merits of the case, the Board affirmed the ALJ’s findings that Claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis. Accordingly, the Board affirmed the ALJ’s award of benefits.

[Requirements for responsible operator designation: ability to pay]