**U.S. Department of Labor**

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

BRB No. 21-0305 BLA

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| JAMES R. ICE, JR. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| SOUTHERN OHIO COAL COMPANY | ) | |
| | ) | |
| and | ) | |
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| CONSOL ENERGY, INCORPORATED | ) | DATE ISSUED: 4/05/2022 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
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| 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 Drew A. Swank, Administrative Law Judge, United States Department of Labor

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2020-BLA-05046) rendered on a claim filed on September 11, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-two years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. He further found Employer failed to rebut the presumption and awarded benefits.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled due to pneumoconiosis if he has 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); 20 C.F.R. §718.305.

On appeal, Employer argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[2]

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.[3] 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).

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[4] or that "no part of [his] respiratory or

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-two years of underground coal mine employment and a totally disabling respiratory impairment, and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 17; Employer's Brief at 4.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibit 4.

[4] "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

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 did not rebut the presumption under either method.[5] Decision and Order at 14, 15.

To disprove legal pneumoconiosis, Employer must establish Claimant does 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 Co.*, 25 BLR 1-149, 1-159 (2015). The United States Court of Appeals for the Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Drs. Celko, Sood, and Krefft each opined Claimant is totally disabled from chronic obstructive pulmonary disease (COPD) due in part to coal mine dust exposure. Director's Exhibit 15 at 2; Claimant's Exhibits 4 at 11-12, 21; 4a at 3-7; 6 at 2-5; 6a at 1-3. Dr. Basheda opined Claimant is totally disabled due to "[m]oderate tobacco induced COPD" with components of asthma and hyperinflation/air trapping of the lungs. Employer's Exhibit 3 at 21-23. Similarly, Dr. Rosenberg opined Claimant has disabling COPD due entirely to smoking and excluded coal mine dust as a contributing factor. Employer's Exhibits 5 at 5-14; 8 at 21-39. Because all of the physicians diagnosed a form of COPD, the ALJ determined Employer could not disprove legal pneumoconiosis. Decision and Order at 16. He also found Employer failed to disprove that no part of Claimant's respiratory disability was caused by his coal mine employment and thus concluded Employer failed to rebut the Section 411(c)(4) presumption. *Id.* at 24-29.

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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).

[5] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 11, 15.

Employer correctly asserts the ALJ's only rationale for discrediting Drs. Basheda's and Rosenberg's opinions on legal pneumoconiosis is that "[t]he Preamble to the regulations links COPD (including asthma, chronic bronchitis, and emphysema) to coal mine dust exposure." Decision and Order at 16, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The ALJ's analysis and conclusion, presented under the heading of his opinion labeled "Existence of Pneumoconiosis," appears to conclude, erroneously, that COPD must be attributable to coal mine dust inhalation and therefore Claimant's COPD constitutes legal pneumoconiosis. *Id*.; Employer's Brief at 8. 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 in light of his consideration of the evidence, *see* 65 Fed. Reg. at 79,938; *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002). Thus, we agree with Employer that the ALJ erred in misstating the import of the preamble to the revised 2001 regulations and in summarily concluding that because Claimant has COPD, Employer was unable to disprove legal pneumoconiosis.

However, the ALJ's error is harmless to his overall finding that Employer did not rebut the Section 411(c)(4) presumption with respect to the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Review of his opinion reveals that his analysis of disability causation constituted an analysis of whether Employer rebutted the presumption of legal pneumoconiosis.[6] *See generally Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). At disability causation, the ALJ considered the relationship between coal mine dust exposure and Claimant's respiratory impairment (his disabling COPD that all of the physicians diagnosed in this case), and he assessed Employer's doctors on the basis of the credibility of their opinions. The ALJ's discrediting of the opinions of Drs. Basheda and Rosenberg rested on credibility determinations which did not implicate the particular standards used for determining the existence of legal pneumoconiosis and disability causation. *See Groves*, 761 F.3d at 600. Further, the particular reasons the ALJ gave for discrediting the physicians' opinions are affirmable.

[6] In his analysis of disability causation, the ALJ considered the relationship of the miner's COPD (respiratory or pulmonary impairment) to his coal dust exposure. While this is a correct consideration with respect to legal pneumoconiosis, a correct analysis of *disability causation* considers the relationship of *pneumoconiosis* to the claimant's *respiratory or pulmonary disability*. 20 C.F.R. §718.305(d)(1)(ii).

Regarding the ALJ's specific credibility determinations, the ALJ correctly observed Dr. Basheda gave many reasons why he excluded coal mine dust exposure as contributing to Claimant's disabling COPD: the variability of Claimant's spirometry results over short periods of time; his acute bronchodilator response on pulmonary function testing; the presence of moderate to severe hyperinflation/air trapping; computed tomography scans showing upper lobe emphysematous changes; a clinical history of frequent exacerbations of his pulmonary disease; Claimant's exposure to other conditions that exacerbate asthma; a history of treatment with medications for tobacco-induced obstructive lung disease/asthma; and the "Dutch hypothesis" which theorizes there is a genetic predisposition to the adverse effects of cigarette smoke. Decision and Order at 26, 28; Employer's Exhibit 3 at 21-23, 26. The ALJ noted Dr. Basheda supported only one of these reasons with references to medical treatises or texts and appeared to believe Claimant's respiratory impairment could be due to smoking or coal mine dust exposure but not both. Decision and Order at 28; Employer's Exhibit 3 at 21-23. The ALJ permissibly found Dr. Basheda's explanations unpersuasive because the physician's opinion was generally unsupported and because he did not adequately address the scientific position, found credible in the preamble, that the risks of smoking and coal mine dust exposure are additive. *See* 65 Fed. Reg. at 79,940; *Young*, 947 F.3d at 407; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); *see also Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 28; Employer's Exhibit 3 at 21-23, 26.

Moreover, the ALJ noted that, even accepting that coal mine dust exposure causes an irreversible impairment, Dr. Basheda did not explain why acute bronchodilator response necessarily precluded coal mine dust exposure from contributing to Claimant's respiratory impairment as none of the pulmonary function study results was fully reversible. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 28; Employer's Exhibits 3, 7.

Dr. Rosenberg excluded coal mine dust exposure as a causative factor for Claimant's disabling COPD based, in part, on the markedly reduced FEV1/FVC ratio shown on pulmonary function testing; he opined this phenomenon is consistent with cigarette smoking and not coal mine dust exposure. Employer's Exhibits 5 at 5-14; 8 at 21-39. The ALJ correctly observed Dr Rosenberg's views on the FEV1/FVC ratio have been routinely rejected and thus permissibly rejected his opinion. *See* 65 Fed. Reg. at 79,943; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d at 483, 491 (6th Cir. 2014); Decision and Order at 29.

The ALJ also permissibly found Dr. Rosenberg's opinion unpersuasive because he did not address whether there are additive effects of coal mine dust exposure on Claimant's COPD in this case, even if the disease is primarily due to smoking. *See* 65 Fed. Reg. at 79,940; *Young*, 947 F.3d at 407; *Stallard*, 876 F.3d at 674; *Rowe*, 710 F.2d at 255; Decision and Order at 28-29; Employer's Exhibits 5 at 5-14; 8 at 21-39. Additionally, the ALJ permissibly found Dr. Rosenberg expressed views in conflict with the regulations, which recognize a miner's coal mine dust exposure may have a latent effect on his respiratory condition. 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding ALJ's decision to discredit physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Banks*, 690 F.3d at 488 (same); Decision and Order at 29.

Employer's arguments are 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). Because the Board can discern what the ALJ did and why he did it, he satisfied his duty of explanation under the Administrative Procedure Act (APA).[7] *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (duty of explanation under the APA "is not intended to be a mandate for administrative verbosity or pedantry;" if a reviewing court can discern "what the ALJ did and why he did it," the duty is satisfied). Here, all of the physicians concluded Claimant has disabling COPD and the ALJ permissibly found Employer's experts' opinions not reasoned as to the etiology of that condition. *See Kennard*, 790 F.3d at 668-69; *Ramage*, 737 F.3d at 1062. Thus, we affirm the ALJ's finding that Employer did not rebut the 411(c)(4) presumption by establishing that either Claimant does not have pneumoconiosis or no part of his respiratory disability is due to legal pneumoconiosis.[8] 20 C.F.R. §718.305(d)(1)(i), (ii).

[7] 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).

[8] Employer's arguments with respect to the ALJ's erring as to his determination regarding the second form of rebuttal (i.e. pneumoconiosis played no part in Claimant's disability) rest entirely on the existence of an error as to the rebuttal of the presumption of legal pneumoconiosis. As we find the presumption of legal pneumoconiosis has not been rebutted, there is no further contention to address.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge