

U.S. Department of Labor

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



BRB No. 20-0399 BLA

STEVEN G. MAHLBERG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL PENNSYLVANIA COAL	)	
COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 08/20/2021
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
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, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05922) rendered on a claim filed on March 26, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with thirty-nine years of qualifying coal mine employment based on the parties' stipulation, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>1</sup> 30 U.S.C. §921(c)(4). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge 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 brief in this appeal.<sup>2</sup>

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is 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); *see* 20 C.F.R. §718.305.

<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established thirty-nine years of qualifying coal mine employment, a totally disabling respiratory impairment, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 23, 27.

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,<sup>4</sup> or that “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 administrative law judge found Employer failed to rebut the presumption by either method.

To disprove legal pneumoconiosis,<sup>5</sup> 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, 1-155 n.8 (2015).

The administrative law judge considered the opinions of Drs. Krefft, Celko, and Sood that Claimant has legal pneumoconiosis, Dr. Rosenberg’s opinion that Claimant could have legal pneumoconiosis, and Dr. Basheda’s opinion that Claimant does not have legal pneumoconiosis but instead has tobacco-induced chronic obstructive pulmonary disease (COPD) with an asthmatic component unrelated to coal mine dust exposure. Decision and Order at 13-16; Director’s Exhibit 17; Claimant’s Exhibits 5a, 7a; Employer’s Exhibits 3, 5, 7-8. The administrative law judge found the opinions of Drs. Krefft, Celko, Sood, and Rosenberg do not aid Employer in rebutting the existence of legal pneumoconiosis. Decision and Order at 26. He further found Dr. Basheda’s opinion not well-reasoned because the preamble to the revised regulations “finds that COPD (including in the form of asthma) constitutes legal coal workers’ pneumoconiosis and directly links asthma to coal mine dust exposure.” Decision and Order at 16.

Employer contends the administrative law judge erred in summarily rejecting Dr. Basheda’s opinion based on the preamble to the revised regulations and in failing to

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<sup>4</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). “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).

<sup>5</sup> The administrative law judge found Employer rebutted the existence of clinical pneumoconiosis, but not legal pneumoconiosis. Decision and Order at 15-16.

consider his specific explanations for why Claimant's asthma is not legal pneumoconiosis.<sup>6</sup> Employer's Brief at 11-13. We agree.

The administrative law judge's only rationale for discrediting Dr. Basheda's opinion is that the preamble "finds that COPD (including in the form of asthma) constitutes legal coal workers' pneumoconiosis and directly links asthma to coal mine dust exposure." Decision and Order at 16, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The administrative law judge appears to have erroneously concluded that COPD must be attributable to coal mine dust inhalation and therefore Claimant's asthma constitutes legal pneumoconiosis. Decision and Order at 16; Employer's Brief at 12-13. Contrary to the administrative law judge's finding, whether an employer is able to rebut the Section 411(c)(4) presumption that a particular miner's COPD or asthma is due to coal mine dust exposure must be determined on a case-by-case basis in light of the administrative law judge's 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); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16 (4th Cir. 2012). The administrative law judge failed to properly determine, based on the specific facts of this case, whether Dr. Basheda provided a reasoned and documented opinion establishing that coal mine dust exposure did not significantly relate to, or substantially aggravate, Claimant's COPD. *See Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257 (3d Cir. 2011); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Because the administrative law judge did not adequately address the physicians' specific rationales for their opinions on legal pneumoconiosis and explain the weight he accorded them, his findings do not satisfy the requirements of the Administrative Procedure Act (APA).<sup>7</sup> *See Wojtowicz*, 12 BLR at 1-165; *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). We therefore vacate the administrative law judge's determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

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<sup>6</sup> Employer also asserts the opinions of Drs. Celko, Krefft, and Sood are not credible because they did not address the possibility that pleural effusions or other health disorders could have affected Claimant's respiratory impairments. Employer's Brief at 15-18.

<sup>7</sup> The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires the administrative law judge to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

The administrative law judge also found Employer failed to establish that no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis.<sup>8</sup> 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 21-23. Because we have vacated the administrative law judge's findings on legal pneumoconiosis, we also vacate his determination that Employer did not establish Claimant's respiratory disability is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we vacate the award of benefits.

On remand, the administrative law judge must reconsider whether Employer disproved the existence of legal pneumoconiosis by affirmatively establishing 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*, 25 BLR at 1-155 n.8. In doing so, he must fully address Drs. Basheda's opinion as to why Claimant's COPD does not constitute legal pneumoconiosis. If he finds Dr. Basheda's opinion would rebut the presumption of legal pneumoconiosis, if considered in isolation, he must further weigh the credibility of Dr. Basheda's opinion against those of Drs. Celko, Krefft, Sood, and Rosenberg.

In evaluating the medical opinions on remand, the administrative law judge should address the physicians' explanations for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. See *Balsavage*, 295 F.3d at 396-97; *Witmer*, 111 F.3d at 354. Further, he must consider all the relevant evidence in reaching his determinations. See *McCune*, 6 BLR at 1-998; Director's Exhibit 26; Employer's Exhibits 1, 2, 4, 5. He must also set forth his findings in detail, including the underlying rationale for his decision as the APA requires. See *Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge finds Employer has disproved the existence of legal pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i) and he need not reach the issue of disability causation. However, if Employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether Employer has rebutted the presumed fact of disability

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<sup>8</sup> The administrative law judge incorrectly stated Employer "must rule out the miner's coal mine employment as a contributing cause of the totally disabling respiratory or pulmonary impairment," Decision and Order at 24, quoting 77 Fed. Reg. 19,456, 19,463 (Mar. 30, 2012), and applied that erroneous standard in analyzing the evidence and reaching his conclusions. The correct standard is whether Employer disproved disability causation by showing that no part of Claimant's respiratory or pulmonary total disability was caused by *pneumoconiosis*. 20 C.F.R. §20 C.F.R. §718.305(d)(1)(ii).

causation at 20 C.F.R. §718.305(d)(1)(ii) with credible evidence that “no part of [Claimant’s] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge’s Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge