**U.S. Department of Labor**

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

BRB No. 21-0490 BLA

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| RAYMOND B. JOHNSON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| EIGHTY-FOUR MINING COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| CONSOL ENERGY, INCORPORATED | ) | DATE ISSUED: 8/30/2022 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of Decision and Order Awarding Benefits of Natalie A. Appetta, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-06344) rendered on a claim filed on October 11, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had thirty-six years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She 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). Further, she found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established he is totally disabled and therefore invoked the Section 411(c)(4) presumption. Alternatively, Employer argues the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response.

The Benefit 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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); see 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-six years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8; Hearing Tr. at 41.

**Invocation of the Section 411(c)(4) Presumption – Total Disability**

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work.[4] *See* 20 C.F.R. §718.204(b)(1). A 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. §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).

The ALJ found Claimant established total disability based on the medical opinions and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21. Employer challenges the ALJ's finding that the medical opinion evidence establishes total disability. Employer's Brief at 3-14.[5]

The ALJ considered the opinions of Drs. Rosenberg, Celko, Go, and Sood that Claimant is totally disabled and Dr. Basheda's opinion that he is not. Decision and Order at 11-21; Director's Exhibit 15; Claimant's Exhibits 6 at 13-14, 8 at 8-9; Employer's Exhibits 6 at 3, 5, 6A at 4, 7 at 14-15, 8 at 17, 20-21. She found Dr. Basheda's opinion inadequately reasoned and Drs. Rosenberg's, Celko's, Go's, and Sood's opinions well-reasoned and documented. Decision and Order at 19-21. Thus, she found Claimant established total disability based on the preponderance of the medical opinions. *Id*. at 21.

Employer argues the ALJ mischaracterized Dr. Rosenberg's opinion in finding the doctor diagnosed a totally disabling respiratory or pulmonary impairment. Employer's Brief at 13. We disagree.

Dr. Rosenberg noted the February 6, 2019 pulmonary function study Dr. Celko conducted revealed "[n]ormal obstruction or restriction," while the October 3, 2019 pulmonary function study Dr. Basheda conducted revealed "a mild restriction supposedly

[4] The ALJ determined Claimant's usual coal mine work as a plant control man required "moderate and heavy labor." We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

[5] The ALJ found Claimant did not establish total disability based on the pulmonary function or arterial blood gas studies, or through evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 8 n.7, 10-11.

based on the total lung capacity measurement." Employer's Exhibit 8 at 19-20. Based on his review of these pulmonary function studies, Dr. Rosenberg stated Claimant is not impaired from a ventilation perspective. Employer's Exhibit 8 at 23-24. He also stated, however, that the February 6, 2019 arterial blood gas study Dr. Celko conducted revealed Claimant has "a fairly severe oxygenation abnormality with exercise." Employer's Exhibit 8 at 14. Dr. Rosenberg concluded "he's disabled based on his gas exchange" and would be unable to return to his usual coal mine work. Employer's Exhibit 8 at 24, 25. Thus, contrary to Employer's argument, the ALJ correctly found Dr. Rosenberg's opinion constitutes a diagnosis of total disability. *See* Decision and Order 20; Employer's Brief at 13.

Employer further argues the ALJ erred in crediting the opinions of Drs. Rosenberg, Celko, Go, and Sood because they did not factor into their opinions the non-qualifying pulmonary function and arterial blood gas studies administered on October 3, 2019, and November 13, 2019. Employer's Brief at 6-9, 11-14, 17-19, 21, 23. We disagree.

Contrary to Employer's argument, an ALJ is not required to discount a physician's opinion on the basis that he did not review the most recent objective testing; rather, a physician can render a reasoned and documented opinion regarding total disability based on his own examination of a miner, review of objective test results, or both. 20 C.F.R. §718.204(b)(2)(iv); *see Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Moreover, Drs. Go and Sood considered the October 3, 2019 and November 13, 2019 pulmonary function and arterial blood gas studies, Claimant's Exhibits 6, 8, and Dr. Rosenberg considered the October 3, 2019 pulmonary function study. Employer's Exhibit 6. Despite the studies' non-qualifying results, the three physicians nevertheless opined Claimant cannot return to his previous coal mine work.[6]

Furthermore, to the extent Employer argues that Drs. Go, Sood, Rosenberg, and Celko could not render total disability opinions due to the non-qualifying results of these studies, it is incorrect. Total disability can be established with a reasoned medical opinion even in the absence of qualifying pulmonary function or arterial blood gas studies. *See* 20 C.F.R. §718.204(b)(2)(iv); *Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir.

[6] Meanwhile, Dr. Celko ordered the November 13, 2019 pulmonary function and blood gas studies. Claimant's Exhibits 4, 5. Although he did not thereafter supplement his February 7, 2019 total disability diagnosis, he emphasized on the non-qualifying pulmonary function study results that Claimant continued to have a "severe reduction" in diffusion capacity. Claimant's Exhibit 4. This is consistent with his earlier diagnosis of total disability based in part on Claimant's "severe reduction in diffusing capacity" on the non-qualifying February 6, 2019 pulmonary function study. Director's Exhibit 15.

2002); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests). Non-qualifying test results alone do not establish the absence of an impairment. *Estep v. Director, OWCP*, 7 BLR 1-904, 1-905 (1985). The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the medical opinion evidence supports a finding that Claimant's respiratory or pulmonary impairment precluded him from performing his usual coal mine work.

Drs. Rosenberg, Celko, Go, and Sood evaluated Claimant's examination results and history, as well as the test results available to them at the time of their evaluations;[7] each physician explained how Claimant's abnormal gas exchange and reduction in diffusion capacity rendered him disabled from performing his usual coal mine work. Director's Exhibit 15; Employer's Exhibits 6 at 3, 5, 6A at 4, 8 at 17, 20-21; Claimant's Exhibits 6 at 13-14, 8 at 8-9. Specifically, Dr. Rosenberg stated Claimant has "a gas exchange abnormality" and "a marked reduction of the diffuse capacity, indicating a loss of [the] alveolar capillary bed" and "probably a class [III] to [IV]" impairment under the American Medical Association (AMA) Guidelines to the Evaluation of Permanent Impairment. Employer's Exhibits 6A at 4, 8 at 17, 21. He also stated Claimant's usual coal mine work as a mechanic required him to perform "heavy" and "very heavy" manual labor. Employer's Exhibit 8 at 9-10. Considering Claimant's "gas exchange abnormalities," his reduction in diffusion capacity, and the exertional requirements of his usual coal mine work, Dr. Rosenberg opined Claimant "would be unable to return to his prior coal mine employment." Employer's Exhibits 6A at 4, 8 at 9-10, 17, 24-25.

Similarly, Dr. Celko stated that while Claimant's pulmonary function studies and resting arterial blood gas studies "do not meet disability standards," "his exercise arterial blood gases on room air do meet the standards" and he has a severe reduction in diffusing capacity and hypoxemia with exercise. Director's Exhibit 15 at 1. He also noted Claimant's "job titles included laborer, miner operator, mechanic, electrician, shearer operator on the long wall and prep plant control man." *Id.* Based on the "aggregate" of

[7] Dr. Rosenberg considered the February 6, 2019 and October 3, 2019 pulmonary function studies and the February 6, 2019 arterial blood gas study. Employer's Exhibit 6. Dr. Celko considered the December 4, 2018 pulmonary function study and the February 6, 2019 arterial blood gas study. Director's Exhibit 15. Drs. Go and Sood considered the December 4, 2018, October 3, 2019, and November 13, 2019 pulmonary function studies and the February 6, 2019, October 3, 2019, and November 13, 2019 arterial blood gas studies. Claimant's Exhibits 6, 8.

his findings, Dr. Celko opined Claimant is "totally disabled from a pulmonary standpoint from returning to his last coal mine job." *Id.* at 1, 2.

Further, Dr. Sood stated that although the arterial blood gas study performed on October 3, 2019 demonstrated "a normal alveolar arterial gradient" and the ambulation oximetry "showed no significant decline in oxygen saturation," Claimant's 6-minute walk test is "severely reduced." Claimant's Exhibit 6 at 7. He also stated the February 6, 2019 exercise arterial blood gas study "met the criteria for total disability under the Black Lung Benefits Act Appendix C tables" and the November 13, 2019 exercise arterial blood gas study "missed the threshold for disability by 4 points." *Id.* at 13. Additionally, Dr. Sood stated the November 13, 2019 "diffusing capacity measurement . . . of 44% of predicted . . . meets the criteria for class IV impairment" under the AMA Guidelines. *Id.* at 14. He concluded Claimant "certainly would not be able to perform the essential duties of his last coal mine employment as a preparation plant control man, in which he was required to perform heavy to strenuous physical labor, including shoveling, carrying hoses, metal sheets and bars, and climbing seven-stories of stairs." *Id.*

Finally, Dr. Go stated Claimant has "exertional arterial blood gas values that demonstrated desaturation with exercise" and a "[m]oderate reduction in diffusion capacity." Claimant's Exhibit 8 at 8. He opined Claimant is totally disabled based on the exercise arterial blood gas studies and diffusion capacity results from the pulmonary function studies that meet the "AMA criteria for a class [III] pulmonary impairment." Claimant's Exhibit 8 at 8-9. He explained Claimant's "level of impairment" prohibits him from performing "the exertional requirement of his last job, which entailed maneuvering 50-60-pound loads, climbing multiple flights of stairs, and dragging hose [sic] hundreds of feet." *Id.*

As the trier-of-fact, the ALJ has broad authority to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage*, 295 F.3d at 396; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). Here, the ALJ permissibly found Drs. Rosenberg, Celko, Go, and Sood adequately explained what data they relied on in concluding Claimant is totally disabled. *See Balsavage*, 295 F.3d at 396; Decision and Order at 19-21. As it is the province of the ALJ to evaluate the medical opinion evidence, and assess its credibility and probative value, we affirm the ALJ's determination that their opinions are credible and reject Employer's argument to the contrary. *See Balsavage*, 295 F.3d at 396; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Kertesz*, 788 F.2d at 163.

We further reject Employer's argument that the ALJ erred in discrediting Dr. Basheda's opinion. Employer's Brief at 10-12. Dr. Basheda acknowledged Claimant has a class III impairment and that the February 6, 2019 exercise arterial blood gas study

"would meet the Department of Labor evaluation for disability." Employer's Exhibits 3 at 7, 9-10, 7 at 22-24. He opined, however, that Claimant is not totally disabled based on Claimant's pulse oximetry results and subsequent arterial blood gas studies. Employer's Exhibits 3 at 9-10, 3A at 3, 7 at 25-26. The ALJ permissibly found Dr. Basheda did not adequately explain "why a class III impairment does not disable [C]laimant from a position requiring medium and heavy exertion."[8] Decision and Order at 21; *see Mancia v. Director,* OWCP, 130 F.3d 579, 589 (3d Cir. 1987) (ALJ may reject a medical opinion that does not adequately explain the basis for its conclusion); *Kertesz*, 788 F.2d at 163. While Employer generally argues Dr. Basheda's opinion is reasoned and documented, its argument is 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); Employer's Brief at 6- 9, 11-14, 17-19, 21, 23.

We thus affirm the ALJ's finding that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21. Furthermore, we affirm her finding that all of the relevant evidence, weighed together, establishes total disability as supported by substantial evidence. *See Rafferty*, 9 BLR at 1-232; *Shedlock,* 9 BLR at 198; 20 C.F.R. §718.204(b)(2); Decision and Order at 21.

We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[9] or that "no part of

[8] Because the ALJ provided a valid reason for discrediting Dr. Basheda's opinion, we need not address Employer's additional arguments regarding the weight the ALJ assigned his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11.

[9] "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 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).

[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.

**Legal Pneumoconiosis**

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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Basheda and Rosenberg that Claimant does not have legal pneumoconiosis. Employer's Exhibits 3, 3A, 6, 6A, 7, 8. Dr. Basheda opined Claimant's restriction may be caused by a combination of pulmonary-related and non-pulmonary-related factors such as his weight or prior cardiovascular surgery, and is unrelated to his coal mine dust exposure. Employer's Exhibit 7 at 19-20. Dr. Rosenberg opined Claimant's chronic bronchitis and primary linear scarring are related to his smoking history and cardiac issues, and unrelated to his coal mine dust exposure. Employer's Exhibits 6 at 6-7, 6A at 2-4. The ALJ found Dr. Basheda's opinion not well-reasoned and Dr. Rosenberg's opinion contrary to the regulations. Decision and Order at 26.

As Employer reiterates its contentions regarding Drs. Basheda's and Rosenberg's opinions on total disability and does not specifically identify any error in the ALJ's finding on legal pneumoconiosis, we affirm her determination that Employer failed to disprove legal pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i).

[10] Because the ALJ's determination that Employer did not disprove legal pneumoconiosis precludes a finding that Claimant does not have pneumoconiosis, we need not address Employer's argument that the ALJ erred in finding it failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-21.

**Disability Causation**

The ALJ found Employer did not rebut the Section 411(c)(4) presumption by establishing "no part of [Claimant'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); *see* Decision and Order at 29-30. Because Employer does not challenge this finding, we affirm it. *See Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; *Skrack*, 6 BLR at 1-711; *Fish*, 6 BLR at 1-109; Decision and Order at 29-30. Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge