**U.S. Department of Labor**

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

BRB No. 22-0459 BLA

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| CLYDE M. CAMPBELL | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| RAW COAL MINING COMPANY | ) | DATE ISSUED: 02/09/2024 |
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| Employer-Petitioner | ) | |
| | ) | |
| 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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

T. Jonathan Cook (Cipriani & Werner, P.C.), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2018-BLA-05978) rendered on a claim filed on January 9,

2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 27.16 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, she determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.304. She concluded Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established a totally disabling respiratory or pulmonary impairment, and therefore erred in finding he invoked the Section 411(c)(4) presumption. Employer further argues the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[4] 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, 362 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone,

[1] Claimant filed and withdrew a prior claim. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 27.16 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[4] This case arises within the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21.

prevents him from performing his usual coal mine work and comparable gainful work. 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 pulmonary function studies, medical opinion evidence, and evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 10, 17.

**Pulmonary Function Studies**

The ALJ considered five pulmonary function studies conducted on May 18, 2017, October 18, 2017, January 11, 2019, January 25, 2019, and August 25, 2020.[6] Decision and Order at 9-10; Director's Exhibits 18, 25; Claimant's Exhibits 1, 3; Employer's Exhibit 1. All the studies produced qualifying[7] values, except for the October 18, 2017 test.[8] Decision and Order at 9; Director's Exhibits 18 at 4; 25 at 3; Claimant's Exhibits 1 at 2; 3 at 2; Employer's Exhibit 1 at 13. However, the ALJ found the August 25, 2020 test to be invalid based on Dr. Fino's uncontracted opinion. Decision and Order at 10; Employer's Exhibit 1. As a preponderance of the valid pulmonary function studies were qualifying for

[5] The ALJ found the arterial blood gas studies do not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 11.

[6] Because the studies reported different heights, the ALJ permissibly averaged them to find Claimant is 65.6 inches tall and used the closest greater table height at Appendix B of 20 C.F.R. Part 718 of 65.7 inches, in determining whether each study is qualifying. *See Carpenter v. GMS Mine and Repair Maint., Inc.*, BLR , BRB No. 22-0100 BLA (Sept. 6, 2023); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8.

[7] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i).

[8] The May 18, 2017, January 11, 2019, and January 25, 2019 pulmonary function studies also produced qualifying values after the administration of bronchodilators, while the October 18, 2017 and August 25, 2020 tests did not include post-bronchodilator results. Director's Exhibits 18, 25; Claimant's Exhibits 1, 3; Employer's Exhibit 1.

total disability, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 9-10.

Although Employer broadly argues that "no objective pulmonary function study showe[d] permanent" total disability and the "studies with the highest volumes did not produce qualifying results," it raises no specific challenges to the ALJ's weighing of the pulmonary function studies. Employer's Brief at 10, 14-15.

To the extent Employer suggests that the ALJ should have credited the non-qualifying study over the qualifying studies, we disagree. *See Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (non-qualifying results are not automatically more credible than contemporaneous qualifying results). Nor did any physician opine the remaining qualifying studies were invalid. 20 C.F.R. §718.103. As three of the four valid pre-bronchodilator pulmonary function studies produced qualifying values, and all of the post-bronchodilator pulmonary function studies produced qualifying values, the ALJ permissibly found the preponderance of the pulmonary function studies support total disability. *See Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); Decision and Order at 9-10.

As Employer raises no other challenges to the ALJ's weighing of this evidence, we affirm her determination that the preponderance of pulmonary function study evidence establishes Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10.

**Medical Opinion Evidence**

Prior to considering the medical opinions, the ALJ found Claimant's usual coal mining job involved "running the continuous miner . . . and the buggy and a shuttle car," which required heavy lifting and strenuous exertion.[9] Decision and Order at 4, n.8; Hearing Transcript at 23-27, 42-43. Employer does not directly challenge the ALJ's finding that Claimant's usual coal mine employment involved working as a continuous miner operator which required heavy lifting and strenuous exertion but asserts that Dr. Fino better understood the exertional requirements of Claimant's usual coal mine employment. Employer's Brief at 13.

Specifically, in a supplemental opinion, Dr. Fino described Claimant's work as requiring seventy percent moderate labor, with his remaining time consisting of equal

[9] The ALJ also acknowledged Claimant's testimony that he worked for "about three months" on a computer. Decision and Order at 4, n.8, quoting Hearing Transcript at 42-43.

amounts of very heavy, heavy, and light labor. Employer's Exhibit 1. Employer asserts this description is more consistent with Claimant's testimony that he last worked tracking employees underground on a computer for three months. Employer's Brief at 13. To the extent Employer suggests that this work constituted Claimant's usual coal mine employment, we disagree.

A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time, *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of respiratory inability to do his usual coal mine work. *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); Daft v. Badger Coal Co., 7 BLR 1-124, 1-127 (1984). The determination will vary on a case by case basis, depending upon the individual's employment history. *Brown v. Cedar Coal Co.*, 8 BLR 1-86, 1-87 (1985); *Shortridge*, 4 BLR at 1-539.

Claimant operated a continuous miner, buggy, and shuttle car for the last twelve years of his coal mine employment, except for the final three months when he worked on a computer after injuring his stomach. Hearing Transcript at 34-35, 46-47; Director's Exhibit 5. As Claimant performed his job as a "tracker" on the computer for only the last three months of his 27.16 years of underground coal mine employment, and he testified without contradiction that he was transferred to that job to facilitate his healing from an abdominal operation and he lacked the technical skills to satisfactorily perform that work, we see no error in the ALJ's determination that his prior work operating a continuous miner, shuttle car, and buggy constituted his usual coal mine employment. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Shortridge*, 4 BLR at 1-539; Decision and Order at 4, Hearing Transcript at 35, 47.

The ALJ next considered the medical opinions of Drs. Habre, Green, and Fino. Decision and Order at 12-17; Director's Exhibits 18, 23, 26; Claimant's Exhibit 4; Employer's Exhibit 1. Dr. Habre diagnosed Claimant with a totally disabling respiratory impairment, i.e., he lacks the pulmonary capacity to perform his usual coal mine work, based on his pulmonary function testing, abnormal arterial blood gas studies with rest and exercise, and chronic bronchitis. Director's Exhibits 18 at 3; 23 at 3. Dr. Green concluded that Claimant is totally disabled from a pulmonary capacity standpoint based on his review of the pulmonary function studies. Claimant's Exhibit 4 at 2. In his initial report, Dr. Fino indicated Claimant had a mild restrictive impairment and a mild reduction in oxygenation with exertion that was totally disabling. Director's Exhibit 26 at 9-10. However, in his September 14, 2020 supplemental report, Dr. Fino concluded that Claimant's mild impairment was not disabling. Employer's Exhibit 1 at 10-11.

The ALJ accorded probative weight to Dr. Habre's initial report, which she found was reasoned and documented,[10] and great weight to Dr. Green's opinion, which she also found reasoned and documented. Decision and Order at 16-17. Conversely, the ALJ accorded no weight to Dr. Fino's opinion as it was internally inconsistent, and he failed to adequately explain the change in his total disability determination. *Id.* at 17. Consequently, she found the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17.

Employer contends the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 11-14. We disagree.

Having affirmed the ALJ's determination that Claimant ran the continuous miner, buggy, and shuttle car, which involved heavy lifting and strenuous exertion, we reject Employer's argument that Dr. Fino's opinion is "superior" because it is the most consistent with Claimant's three months of work as a computer tracker which required little to no lifting. Employer's Brief at 9-10, 13.

Nor are we persuaded by Employer's suggestion that Drs. Habre and Green did not have an accurate understanding of the exertional requirements of Claimant's job. Employer's Brief at 13. Dr. Habre accurately reported that Claimant's last coal mine employment involved running the continuous miner, which aligns with the ALJ's findings.[11] *See Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); Employer's Brief at 13; Director's Exhibits 18 at 1; 23 at 1. Similarly, Dr. Green reviewed the opinions of Drs. Fino and Habre that reflected Claimant worked as a continuous miner operator, and specifically indicated Claimant's employment required heavy and very heavy labor, consistent with the ALJ's findings. *See Walker*, 927 F.2d at 184; *Lane*, 105 F.3d at 172; Employer's Brief at 9, 13; Claimant's Exhibit 4 at 3.

As Employer raises no other challenges to the ALJ's credibility findings regarding the opinions of Drs. Habre and Green, we affirm her determination to accord probative weight to Dr. Habre's report and great weight to Dr. Green's opinion. *See Compton*, 211

[10] The ALJ accorded little weight to Dr. Habre's supplemental report because it referenced testing not in the record. Decision and Order at 16.

[11] Additionally, there is no requirement that Dr. Habre break down the amount of time Claimant spent performing each degree of exertion by percentage like Dr. Fino. Employer's Brief at 13.

F.3d at 207-08; *Hicks*, 138 F.3d at 528; *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-17.

We also reject Employer's argument that the ALJ erred in discrediting Dr. Fino's opinion. Employer's Brief at 11-14. Dr. Fino examined Claimant on October 18, 2017, and opined he has a "mild reduction" in the FVC and FEV1 on pulmonary function testing and mild oxygen desaturation during exercise. Director's Exhibit 26 at 6. He then opined that Claimant's mild impairment would render Claimant unable to perform his usual coal mine employment as a continuous miner and shuttle car operator, which required him to perform "very heavy labor" eighty percent of the time. *Id*. at 9-10.

Dr. Fino again examined Claimant on August 25, 2020; however, the pulmonary function study conducted at that time was invalid and the results of his exercise study were lost. Employer's Exhibit 1 at 6-7. He opined Claimant was not totally disabled based on the invalid pulmonary function studies, his history, a normal diffusion capacity, and normal resting blood gas studies. *Id*. at 10.

Employer points out that Dr. Fino opined Claimant's mild impairment would render him disabled from performing a job that "overwhelmingly" requires *moderate labor*. Employer's Brief at 14; Director's Exhibit 26 at 6; Employer's Exhibit 1 at 6-7. However, the ALJ found Claimant's usual coal mine employment required heavy lifting and strenuous labor.[12] Decision and Order at 4. As Dr. Fino did not address whether Claimant's mild impairment would render him unable to perform *heavy labor*, we see no error in the ALJ's finding that Dr. Fino did not adequately explain his determination that Claimant's usual coal mine employment was not disabling. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); Decision and Order at 16-17.

Moreover, the ALJ permissibly discredited Dr. Fino's opinion as he failed to adequately explain the change in his opinion, from diagnosing Claimant's mild impairment as totally disabling in his initial opinion, to opining the mild impairment was not disabling in his supplemental opinion. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 1096 (4th Cir. 1993); Decision and Order at 16-17.

[12] As noted, Dr. Fino opined Claimant could *not perform* a job requiring primarily very heavy labor. Director's Exhibit 26 at 9-10.

Employer's arguments amount to 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). We therefore affirm the ALJ's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17. As Employer raises no other challenges to the ALJ's findings, we affirm her determination that Claimant established total disability based on the pulmonary function studies and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i), (iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; Decision and Order at 17.

We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 17.

**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,[13] 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 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 opinion of Dr. Fino, that Claimant does not have legal pneumoconiosis but instead has a mild impairment secondary to his chest wall injury from

[13] "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).

a mining accident in 1989.[14] Employer's Exhibit 1 at 10. The ALJ discredited Dr. Fino's opinion as not well reasoned or supported and therefore found Employer did not rebut the existence of legal pneumoconiosis. Decision and Order at 20.

Employer argues the ALJ erroneously discredited Dr. Fino's opinion when it was supported by the objective testing and the physician consistently explained that Claimant's lung impairment was related to the chest wall injury from 1989. Employer's Brief at 14. We disagree.

Dr. Fino attributed Claimant's respiratory impairment to his prior chest wall injury because his x-ray changes and the reduction in his FEV1 and FVC on pulmonary function testing are consistent with the injury, and because his chest x-rays do not demonstrate any evidence of clinical pneumoconiosis. Director's Exhibit 26 at 11; Employer's Exhibit 1 at 11. The ALJ permissibly discredited Dr. Fino's opinion because the physician did not explain whether Claimant's lengthy coal mine dust exposure also significantly contributed to, or aggravated, his mild impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 19-20. Consequently, we affirm the ALJ's determination that Employer did not disprove the existence of legal pneumoconiosis.[15] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 20.

Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address Employer's arguments regarding clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 14-15. We therefore affirm the ALJ's conclusion that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 20-21.

[14] The ALJ considered the opinions of Drs. Habre and Green, but she accurately found they do not assist Employer in rebutting the presumption because they both diagnosed Claimant with legal pneumoconiosis. Decision and Order at 20; Director's Exhibit 18; Claimant's Exhibit 1.

[15] As we have affirmed the ALJ's determination that Dr. Fino's opinion is not sufficient to rebut the existence of legal pneumoconiosis, we need not address its challenges to the ALJ's weighing of the contrary opinions of Drs. Habre and Green. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 14-15.

**Disability Causation**

The ALJ next considered whether Employer established "no part of the miner'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); Decision and Order at 20-21. She permissibly discredited Dr. Fino's opinion because she found no specific or persuasive reason for finding his disability causation opinion did not rest upon a disagreement with her previous finding that Employer failed to disprove legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Assoc. Coal Co*., 43 F.3d 109, 116 (4th Cir. 1995); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 21. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge