



BRB No. 20-0290 BLA

WILLIAM A. FARMER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PARAMONT COAL COMPANY)	
VIRGINIA, LLC)	
)	
and)	
)	DATE ISSUED: 05/25/2021
AIG/CHARTIS)	
)	
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, on Request for Modification of an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Larry S. Merck's Decision and Order Awarding Benefits, on Request for Modification of an Initial Claim (2018-BLA-05049) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of the denial of a miner's claim filed on December 24, 2013.

In a January 10, 2017 Decision and Order Denying Benefits, Administrative Law Judge Drew A. Swank found Claimant did not establish total respiratory or pulmonary disability. Director's Exhibit 27. Claimant timely filed a request for modification on June 30, 2017. Director's Exhibit 28. Following the district director's denial of benefits, Claimant requested a hearing and the case was referred to the Office of Administrative Law Judges and assigned to Judge Merck (the administrative law judge). Director's Exhibits 31, 32.

In his April 28, 2020 decision, which is the subject of this appeal, the administrative law judge credited Claimant with thirty-three years of underground coal mine employment and found the new evidence submitted on modification, in conjunction with the evidence previously submitted, established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined that Claimant established a change in conditions at 20 C.F.R. §725.310, and invoked the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) presumption of the Act¹ 30 U.S.C. §921(c)(4). He further found Employer did not rebut the presumption. The administrative law judge also found that granting modification would render justice under the Act and thus 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 response brief.²

¹ Section 411(c)(4) 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 administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption, that he established a basis for modification, and that Claimant's request for modification, if granted, would render justice

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

The administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); see *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

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 Claimant has neither legal nor clinical pneumoconiosis,⁴ 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 establish rebuttal by either method.

under the Act. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 19-20, 34.

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 37.

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 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).

Clinical Pneumoconiosis

We affirm, as unchallenged, the administrative law judge's finding that Employer failed to disprove the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant did not have pneumoconiosis, we will address the issue of legal pneumoconiosis because it is relevant to the second method of rebuttal. 20 C.F.R. §718.305(d)(1)(i).

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 Dr. Sargent's opinions from 2014 and 2018. The administrative law judge found Dr. Sargent's opinion not well reasoned and insufficient to disprove Claimant has legal pneumoconiosis. Decision and Order at 27. Employer argues the administrative law judge did not adequately explain his discrediting of Dr. Sargent's opinion as the Administrative Procedure Act (APA) requires.⁵ 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); Employer's Brief (unpaginated) at 4. We disagree.

Dr. Sargent examined Claimant on July 16, 2014, and opined Claimant's pre-bronchodilator pulmonary function study showed a moderate respiratory impairment. He also noted that the post-bronchodilator study showed significant improvement and demonstrated only a mild respiratory impairment. Director's Exhibit 11. Dr. Sargent opined that Claimant's respiratory impairment was due to smoking. As the administrative law judge noted, however, Dr. Sargent testified that while smoking may cause a

⁵ 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).

significantly reversible obstructive lung disease, coal mine dust exposure does not.⁶ Director's Exhibit at 27 at 32. Because a June 20, 2014 pulmonary function study showed only partial reversibility post-bronchodilator, the administrative law judge permissibly found "Dr. Sargent's earlier opinion did not rebut the presumed presence of legal pneumoconiosis" because he failed to adequately address the cause of the irreversible impairment.⁷ Decision and Order at 27; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Dr. Sargent next examined Claimant on June 17, 2018. He opined that, subsequent to 2014, Claimant's respiratory condition deteriorated because he developed lung cancer and had to undergo lung resection surgery. Employer's Exhibit 1. Dr. Sargent stated Claimant's 2018 pulmonary functions studies showed a disabling, mixed obstructive and restrictive respiratory impairment and his blood gas studies also showed a disabling oxygenation impairment. *Id.* He opined that Claimant is totally disabled and that his current respiratory disability was caused entirely by lung cancer due to smoking. *Id.*

Contrary to Employer's contention, the administrative law judge permissibly found Dr. Sargent's 2018 opinion unpersuasive because he again failed to adequately discuss the etiology of Claimant's irreversible respiratory impairment, first shown on pulmonary functions studies in 2014 before Claimant developed lung cancer, and failed to explain how that impairment related to his current disability.⁸ See *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Moreover, the administrative law judge correctly noted that in his recent report, Dr. Sargent focused on the etiology of Claimant's obstructive impairment shown on his pulmonary function studies but did not adequately address the etiology of Claimant's "significant arterial oxygenation desaturation," as evidenced by Claimant's July 17, 2018 exercise blood gas study. Decision and Order at 27, quoting Employer's Exhibit 1.

⁶ The administrative law judge pointed to Dr. Sargent's explanation that if coal mine dust causes an impairment, it is irreversible and therefore does not respond to bronchodilator administration. Decision and Order at 27.

⁷ Dr. Sargent noted it was "unlikely" that Claimant's coal mine dust exposure contributed to his non-reversible respiratory impairment. Director's Exhibit 27 at 14

⁸ All of Claimant's post-bronchodilator pulmonary function studies that the parties submitted on modification are qualifying for total disability. Decision and Order at 13. A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. Sargent's opinion is insufficient to affirmatively establish Claimant does not have legal pneumoconiosis. See 5 U.S.C. §557(c)(3)(A); *Harman Mining Co. v. Director, OWCP* [Looney], 678 F.3d 305, 316 (4th Cir. 2012) ("If a reviewing court can discern what the [administrative law judge] did and why [he] did it, the duty of explanation [under the APA] is satisfied."); Decision and Order at 27.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and assign those opinions appropriate weight. See *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013). We consider Employer's arguments on legal pneumoconiosis to be 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 his finding that Employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. See 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Next, the administrative law judge found Employer failed to establish "no part of the [M]iner'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 33-34. The administrative law judge rejected Dr. Sargent's opinion on disability causation based on his determination that Dr. Sargent did not adequately explain why Claimant does not have legal pneumoconiosis. Decision and Order at 34. He repeated his prior findings that Dr. Sargent did not discuss why Claimant's irreversible impairment first shown in 2014 or his disabling blood gas study impairment was not caused by coal mine dust exposure. *Id.*

Employer states that "even if the [administrative law judge] is correct in that the earlier non-disabling impairment was related to the claimant's coal dust exposure," it may still rebut the presumption by showing Claimant's current "disabling impairment was not related to coal dust." Employer's Brief at 8 (unpaginated). Essentially, Employer asserts that while Claimant may have had legal pneumoconiosis in 2004, Dr. Sargent has shown why his current respiratory disability is due to lung cancer from smoking. Employer however, must rule out any contribution from legal pneumoconiosis to Claimant's respiratory disability. The administrative law judge permissibly found Dr. Sargent did not persuasively explain why Claimant's legal pneumoconiosis did not partially contribute to, or materially worsen, his disabling respiratory impairment caused by smoking and lung cancer. Decision and Order at 34, citing *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 1434 (4th Cir. 2015); see also *Cochran*, 718 F.3d at 324; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Employer does not raise any additional arguments on disability causation other than its general assertion that Claimant does not have legal pneumoconiosis, which we rejected. Employer's Brief (unpaginated) at 4-8. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that Employer failed to establish that no part of the Miner's respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits, on Request for Modification of an Initial Claim.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge