**U.S. Department of Labor**

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

BRB No. 20-0569 BLA

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| JAMES T. GAYDOS | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | |
| | ) | |
| and | ) | |
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| CONSOL ENERGY, INCORPORATED | ) | DATE ISSUED: 11/23/2021 |
| | ) | |
| Employer/Carrier-<br>Petitioners | ) | |
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| 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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawloski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

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

Before: BUZZARD, 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 (2019-BLA-06161) 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 ALJ credited Claimant with twenty-two years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[2] Claimant responds in support 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.[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 (1965).

**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,[4] or that "no part of

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[1] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-two years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), 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 7.

[3] 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. Decision and Order at 5; Director's Exhibit 11, 12, 13.

[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

[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.[5]

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, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Basheda and Rosenberg that Claimant does not have legal pneumoconiosis. Employer's Exhibits 2, 4, 8, 9. Dr. Basheda diagnosed Claimant with "intermittent airway obstruction consistent with asthma" that is "not related to his coal mining work or coal dust exposure."[6] Employer's Exhibit 2 at 32. He excluded legal pneumoconiosis because Claimant's "asthma occurred long after leaving the coal mines."[7] *Id.* at 33. Dr. Rosenberg diagnosed Claimant with "tobacco-induced [chronic obstructive pulmonary disease (COPD)] with asthmatic bronchitis" and emphysema. Employer's Exhibit 9 at 23. He excluded legal pneumoconiosis because Claimant did not

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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).

[5] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 14.

[6] Dr. Basheda indicated Claimant's asthma could be due to multiple causes, including obesity, lung surgery, and chemotherapy treatments for lung cancer. Employer's Exhibits 2, 8.

[7] Dr. Basheda opined that the symptoms of occupational asthma subside once a miner leaves coal mine employment. Employer's Exhibit 8 at 27. He concluded that because Claimant "had normal pulmonary function tests years after leaving the [coal mines]" and has "intermittent symptoms that come and go long after the [coal mines]," Claimant's asthma "is not occupational asthma" and therefore does not constitute legal pneumoconiosis. *Id.*

exhibit respiratory issues within "the time frame when he ended his coal mine employment" in 2000.[8] Employer's Exhibit 4 at 12.

Contrary to Employer's arguments, the ALJ permissibly discredited their opinions because the regulations provide that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[9] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 20-22; Employer's Brief at 7-8, 10.

Employer generally argues the ALJ should have found the opinions of Drs. Basheda and Rosenberg well-reasoned and documented. Employer's Brief at 5-10. We consider Employer's argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).[10]

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[8] Dr. Rosenberg opined that any obstructive impairment related to coal mine dust exposure "will be displayed in the first few years after beginning work in the coal mines." Employer's Exhibit 4 at 11. He concluded Claimant's "current respiratory complaints are of a recent onset and are not representative of legal [pneumoconiosis]." *Id*. at 12.

[9] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Basheda and Rosenberg, we need not address Employer's additional arguments regarding the weight he assigned their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 10.

[10] Employer argues the ALJ erred in determining Claimant's treatment records support a finding of legal pneumoconiosis because they "do not indicate a diagnosis of coal workers' pneumoconiosis or a condition related to [Claimant's] coal dust exposure." Employer's Brief at 11-12. Employer, however, must establish Claimant does not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. 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). As Employer does not allege that the treatment records include any medical opinion concluding Claimant does not have legal pneumoconiosis, we consider any potential error by the ALJ in finding the treatment records supportive of a finding of legal pneumoconiosis to be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because the ALJ permissibly discredited the opinions of Drs. Basheda and Rosenberg, the only opinions supportive of Employer's burden on rebuttal,[11] we affirm his finding Employer did not disprove legal pneumoconiosis. 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).

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established that 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). The ALJ rationally discounted the opinions of Drs. Basheda and Rosenberg regarding the cause of Claimant's disability because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease.[12] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Employer's Brief at 14-15. We therefore affirm the ALJ's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

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[11] To the extent that Dr. Holt attributed Claimant's disabling impairment to coal dust exposure, the ALJ erred in finding he did not offer an opinion on legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b). Regardless, Employer does not challenge the ALJ's finding that his opinion does not support its burden to rebut legal pneumoconiosis. That finding is therefore affirmed. *Skrack*, 6 BLR at 1-711.

[12] As we have affirmed the ALJ's finding that Employer did not disprove disability causation based on the opinions of Drs. Basheda and Rosenberg, we need not address Employer's arguments regarding the ALJ's consideration of Dr. Holt's opinion that Claimant is totally disabled due to pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 10-11.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge