**U.S. Department of Labor**

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

BRB No. 21-0496 BLA

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| PERRY F. MUNDAY | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| WARRIOR COAL, LLC | ) | |
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| and | ) | |
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| ALLIANCE COAL, LLC | ) | DATE ISSUED: 11/04/2022 |
| | ) | |
| 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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Daniel Sherman (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Awarding Benefits (2019-BLA-05287) rendered on a claim filed on February 7, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-nine years of underground coal mine employment based on the parties' stipulation and determined he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he 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). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. It also contends he 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 not filed a response brief.

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 Assoc., Inc.*, 380 U.S. 359 (1965).

**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. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with

[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 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-nine years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 18.

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

right-sided congestive heart failure, or medical opinions.[4] 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 considered the opinions of Drs. Selby, Rosenberg, Sood, Chavda, and Baker. Decision and Order at 20-21. Drs. Selby and Rosenberg opined Claimant is not totally disabled because his pulmonary function and arterial blood gas studies are non-qualifying.[5] Director's Exhibits 35, 38 at 4-5, 22; Employer's Exhibit 2 at 7-8. Dr. Sood opined Claimant is unable to perform the heavy labor required by his usual coal mine employment based on his reduced diffusing capacity as evidenced by objective testing. Claimant's Exhibit 11 at 13-14. Drs. Chavda and Baker opined Claimant is totally disabled based, in part, on their respective diagnoses of complicated pneumoconiosis. Director's Exhibit 12 at 15; Claimant's Exhibit 6 at 2-3. The ALJ gave the opinions of Drs. Chavda and Baker reduced weight as they are contrary to his finding Claimant does not have complicated pneumoconiosis. Decision and Order at 20. He further discredited the opinions of Drs. Selby and Rosenberg as inadequately explained. *Id.* at 20-21. However, he credited Dr. Sood's opinion as well-reasoned and documented, and found it establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 21.

Employer first contends the ALJ erred in discrediting Dr. Selby's opinion.[6] Employer's Brief at 12-15. We disagree.

Dr. Selby opined Claimant's pulmonary function testing results are consistent with a moderate reduction in diffusion capacity. Director's Exhibit 38 at 4. Although he stated Claimant "had pneumonia and blood clots leaving him with damaged lungs causing shortness of breath that may be permanent," he concluded Claimant "does have the respiratory capacity to perform his previous coal mine work or similar (sic)." *Id.* at 22. In

[4] The ALJ found the pulmonary function studies and arterial blood gas studies do not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 19.

[5] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] We affirm, as unchallenged on appeal, the ALJ's discrediting of Dr. Rosenberg's opinion, and his finding the opinions of Drs. Chavda and Baker entitled to reduced weight. *Skrack*, 6 BLR 1-710, 1-711; Decision and Order at 20-21.

addition, he noted Claimant is "recovering from an infectious/inflammatory lung problem and is improving over the past few months," and "pulmonary function studies and arterial blood gases would suggest [Claimant] would not be impaired from doing his previous coal mine duties or similar arduous work in a dust free environment. His exercise testing confirms this as does his [six] minute walk testing." *Id*. Although Dr. Selby indicated Claimant worked as a supply man from 1998 until he retired in 2017, the ALJ permissibly found his opinion unpersuasive because he did not adequately explain his opinion that Claimant could perform the work of a supply man in light of "the specific requirements" of that job. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (a physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); Decision and Order at 20.

Employer argues Dr. Selby did have an adequate understanding of the exertional requirements of Claimant's usual coal mine employment because he stated he reviewed Dr. Chavda's medical report which sets forth on a Department of Labor Form CM-988 the exertional requirements of working as a supply man. Employer's Brief at 13-14. Thus it argues the ALJ erred in discrediting his opinion. Whether Dr. Selby adequately set forth his knowledge of the Claimant's usual coal mine employment is a factual finding for the ALJ. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002). Contrary to Employer's argument, although Dr. Selby reviewed and generally summarized Dr. Chavda's recitation of the duties of a supply man, substantial evidence supports the ALJ's finding that Dr. Selby did not actually "address the specific requirements" of that job in opining that Claimant was not disabled by his reduced diffusion capacity and shortness of breath.[7] Employer's argument is a request to reweigh the evidence, which we are not

[7] Although Dr. Selby opined Claimant's pneumonia-related lung problems and his blood clots both improved, he did not state that the shortness of breath and his reduced diffusion capacity had completely resolved. Director's Exhibits 35, 38. We can discern no explanation in Dr. Selby's opinion regarding the impact of Claimant's permanent shortness of breath and reduced diffusion capacity on his ability to perform the tasks associated with working as a supply man. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002). Thus substantial evidence supports the ALJ's rejection of Dr. Selby's opinion. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion).

empowered to do.[8] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore reject it.

Employer also asserts the ALJ erred in crediting Dr. Sood's opinion. Employer's Brief at 17. We disagree. Dr. Sood opined that, although Claimant's most recent pulmonary function and arterial blood gas testing is non-qualifying, his "most recent diffusing capacity [testing], when adjusted for Crapo reference standards, is [forty-one percent] predicted . . . ." Claimant's Exhibit 11 at 5. According to Dr. Sood, Claimant's reduced diffusing capacity "qualifies [as a] class IV [impairment], or the most severe category of impairment," under the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. *Id*. He recognized Claimant's usual coal mine employment entailed working as a supply man and "he performed heavy physical labor, which included lifting and carrying heavy weights, such as concrete blocks that weighed up to [eighty] pounds." *Id*. at 2. Dr. Sood explained that individuals "in this category are moderately impaired with progressively lower levels of lung function correlating with diminishing ability to meet the physical demands of many jobs." *Id*. at 14. Thus, he concluded Claimant "would not be able to perform his last coal mine job, which included heavy physical labor such as lifting and carrying heavy weights such as concrete blocks that weighed up to [eighty] pounds." *Id*. Contrary to Employer's argument, the ALJ permissibly found Dr. Sood's opinion well-reasoned and "supported by the objective medical evidence," as the doctor "considered the totality of the objective testing findings, as well as the exertional requirements of [Claimant's] last job, and concluded [his] pulmonary impairment would preclude him from performing this job." Decision and Order at 21; *see Napier*, 301 F.3d at 713-714; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Employer finally argues Claimant cannot establish total disability through Dr. Sood's opinion because the doctor did not address whether Claimant is able to perform comparable gainful employment. Employer's Brief at 15-16. Contrary to Employer's argument, Claimant is not required to prove that he is totally disabled from *all* work in order to establish that he is totally disabled under the regulations. *Id*. Once a miner establishes he is unable to perform his usual coal mine work, a prima facie case for total disability exists and the party opposing entitlement bears the burden of presenting evidence that the miner is capable of performing "gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those" of his previous coal mine work. *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83, 1-86-87 (1988) (declining

[8] Because the ALJ provided a valid reason for discrediting Dr. Selby's opinion on total disability, we need not address Employer's remaining argument regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 14-15.

to interpret the regulation as requiring more restrictive criteria than the criteria under the Social Security Act, as Section 402(f)(1) of the Act mandates, 30 U.S.C. §902(f)(1));[9] 20 C.F.R. §718.204(b)(1).

Employer argues the opinions of Drs. Selby and Rosenberg satisfied this burden because they opined Claimant is not totally disabled from his coal mine work, could perform similarly arduous work, or both. Employer's Brief at 15-16. We disagree. Because we have affirmed the ALJ's findings that Dr. Selby's and Dr. Rosenberg's opinions are not credible, they are insufficient to establish Claimant is capable of performing comparable gainful employment.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established total disability and therefore invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 21.

**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,[10] or that "no part

[9] In *Taylor*, a case that also arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the Board held that if the former regulation at 20 C.F.R. §718.204(c) (1980) were interpreted as requiring claimants to prove not only an inability to perform their usual coal mine work, but also the inability to perform comparable gainful work, it would impose a burden of proof on miners that various Courts of Appeals, including the Sixth Circuit, had not imposed on miners under Section 223(d) of the Social Security Act. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-86-87 (1988) (citing collected cases). Because the Act prohibits the Secretary of Labor from defining total disability with more restrictive criteria than those imposed under Section 223(d) of the Social Security Act, *see* 30 U.S.C. §902(f), the Board declined to interpret the regulation in such a manner. Thus, the Board held that, under 20 C.F.R. Part 718, once a claimant has established an inability to perform his usual coal mine employment, a prima facie case for total disability exists. Thereafter, the party opposing entitlement bears the burden of going forward with evidence to prove the claimant can perform comparable and gainful employment. *Taylor*, 12 BLR at 1-87.

[10] "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

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.[11]

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 Sixth Circuit holds this standard requires Employer show Claimant's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id.* at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The ALJ considered the opinions of Drs. Selby and Rosenberg[12] that Claimant does not have legal pneumoconiosis because his emphysema is caused by his past cigarette smoking and is unrelated to coal dust exposure. Director's Exhibits 35, 38 at 20-21; Employer's Exhibit 2 at 8-9. The ALJ discredited Dr. Selby's opinion as inadequately reasoned and Dr. Rosenberg's opinion as inconsistent with the medical science set forth in the preamble to the 2001 revised regulations. Decision and Order at 26-27.

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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).

[11] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 25.

[12] The ALJ also considered the opinions of Drs. Baker, Chavda and Sood that Claimant has legal pneumoconiosis. Decision and Order at 25-27; Director's Exhibit 12; Claimant's Exhibits 6, 11; Employer's Exhibit 6. Because they do not aid Employer in rebutting the presumption of legal pneumoconiosis, we need not address Employer's arguments regarding the ALJ's weighing of their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 18-24.

Employer argues the ALJ erred in discrediting Dr. Selby's opinion.[13] Employer's Brief at 24-25. We disagree.

Dr. Selby opined Claimant's pneumonia and blood clots "likely" damaged his lung arteries causing permanent shortness of breath, and his cigarette smoking "likely" caused emphysema and dissolved lung tissue leading to a low diffusion capacity. Director's Exhibit 38 at 5, 22. He further opined Claimant's x-rays suggest he had an infectious disease that caused lung scarring. *Id.* at 5, 21. The ALJ permissibly discredited Dr. Selby's opinion because, while Dr. Selby identified "a number of potential causes for [Claimant's] emphysema and shortness of breath," he failed to adequately explain why Claimant's respiratory conditions were not significantly related to, or substantially aggravated by, his "very significant" thirty-nine-year history of coal mine dust exposure. Decision and Order at 26-27; *see Young*, 947 F.3d at 405; *Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause").

Because the ALJ permissibly discredited the only medical opinions supportive of a finding that Claimant does not have legal pneumoconiosis,[14] we affirm his finding Employer failed to disprove the existence of the disease. 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).

The ALJ next considered whether Employer established "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); Decision and Order at 27-28. He permissibly discredited the opinions of Drs. Selby and Rosenberg on disability causation because they failed to diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*,

[13] We affirm, as unchallenged on appeal, the ALJ's discrediting of Dr. Rosenberg's opinion. *Skrack*, 6 BLR 1-710, 1-711; Decision and Order at 26-27.

[14] Employer contends remand is required for the ALJ to make a specific finding on the length of Claimant's smoking history. Employer's Brief at 17-19. We disagree. The ALJ did not reject the opinions of Drs. Selby and Rosenberg for relying on an over-inflated smoking history; he found they failed to adequately explain how they concluded that Claimant's impairment was unrelated to his thirty-nine years of coal mine dust exposure. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 26-27.

737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 27. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption and the award of benefits.

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