U.S. Department of Labor

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

BRB No. 20-0383 BLA

JAMES E. PATTERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 09/29/2021
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 Denying Employer's Request for Modification of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) William S. Colwell's Decision and Order Denying Employer's Request for Modification (2016-BLA-05898) 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 Employer's request to modify an award of benefits.

Claimant filed this claim on November 24, 2010. In a May 13, 2014 Decision and Order Awarding Benefits, ALJ Daniel F. Solomon credited Claimant with thirty 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); Director's Exhibit 52. He 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). He further found Employer did not rebut the presumption and awarded benefits. Director's Exhibit 52. Pursuant to Employer's appeal, the Benefits Review Board affirmed the award. *Patterson v. Consol. Coal Co.*, BRB No. 14-0315 BLA (Mar. 18, 2015) (unpub.).

Employer timely requested modification. Director's Exhibit 70. In his Decision and Order Denying Employer's Request for Modification that is the subject of this appeal, ALJ Colwell (the ALJ) found Employer failed to establish a mistake in a determination of fact in ALJ Solomon's award of benefits. He also found it failed to establish a change in conditions based on new evidence. Thus he denied Employer's request for modification. 20 C.F.R. §725.310.

On appeal, Employer argues the ALJ erred in denying its request for modification. It specifically challenges the constitutionality of the Section 411(c)(4) presumption. It also argues the ALJ erred in weighing the evidence on the issue of total disability and in invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2). Employer further argues the ALJ erred in finding it did not rebut the presumption. Finally, it challenges the date for commencement of benefits.[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, filed a limited response urging the Board to reject Employer's constitutional argument. He further argues the Board should reject Employer's arguments that the ALJ applied an incorrect standard for rebutting the presumption of legal pneumoconiosis and erred in determining the benefits commencement date.

[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 administrative law judge's (ALJ) finding that Claimant had thirty years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 20.

The 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).

Where an employer seeks modification to terminate an award of benefits, it bears the burden to establish a change in conditions or a mistake of fact with regard to at least one element of entitlement. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008); 20 C.F.R. §725.310(a). Any "mistake may be corrected [by the ALJ], 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); *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). A party is not required to submit new evidence because an ALJ has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."[4] *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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[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); Hearing Tr. at 28-29.

[4] Notably, the ALJ held that he was required to make a "threshold" determination of whether granting modification would render justice under the Act prior to considering the modification petition on the merits. Decision and Order at 3-4, *citing Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 128 (4th Cir. 2007). While *Sharpe I* held that an ALJ must consider the question before ultimately granting *the relief* requested in a modification petition, nothing in it establishes that an ALJ may make the determination at the outset, before *considering the merits* of the petition, even in cases with no new evidence. While it might make sense to make a threshold determination in cases of obvious bad faith, it does not follow that a threshold determination is appropriate in cases such as this where there is no indication of an improper motive. In such a case, the ALJ must first consider the merits, which will generally resolve the *Sharpe I* inquiry. *See O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (the plain purpose of modification is to vest an adjudicator with "discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."). Given the ALJ considered the merits of Employer's petition, however, any error in finding he had the discretion to refuse to consider the petition is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Constitutionality of the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 22-24. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Pulmonary Function Studies

ALJ Solomon found Claimant established total disability based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Director's Exhibit 52 at 2-3, 8-9. He considered four studies dated January 18, 2011, May 24, 2011, May 10, 2012, and December 26, 2013. Director's Exhibits 10, 28, 39. The January 18, 2011, May 24, 2011, and May 10, 2012 studies produced non-qualifying results,[5] but the December 26, 2013 study produced qualifying results. *Id*. ALJ Solomon acknowledged Dr. McSharry's opinion that the December 26, 2013 study cannot be used to assess total disability because it did not include post-bronchodilator testing. He found Dr. McSharry's rationale not credible, however, because total disability can be established by pre-bronchodilator values

[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).

and the Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability. Director's Exhibit 59 at 8-9; 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("[T]he use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."). Thus he found this study valid. *Id*. He further assigned controlling weight to the study because it was taken most recently. Director's Exhibit 52 at 9. Thus he found this evidence establishes total disability.[6] *Id*.

In evaluating Employer's request for modification, the ALJ found no mistake of fact with respect to ALJ Solomon's finding that the pulmonary function studies establish total disability.[7] Decision and Order on Modification at 20.

Employer argues the ALJ failed to consider new evidence that establishes the December 26, 2013 study is invalid. Employer's Brief at 7-8. It specifically argues Dr. McSharry testified in a deposition that the study is not valid because the reported "FEV1 value did not look like it was reproducible" and "might not represent the best effort [Claimant] could provide." *Id*., *quoting* Employer's Exhibit 15 at 17.

Even assuming Dr. McSharry's summary statements could credibly rebut the presumption that the pulmonary function study complies with the regulatory quality standards, *see* 20 C.F.R. §718.103(c), the ALJ specifically acknowledged Dr. McSharry's more recent deposition testimony questioning whether the December 26, 2013 study results are reproducible and "trustworthy." Decision and Order on Modification at 11, *citing* Employer's Exhibit 15 at 17. He nevertheless permissibly found "Dr. McSharry's supplemental opinions do not cause [him] to conclude that there was a mistake of fact in [ALJ] Solomon's [earlier] finding of total disability."[8] Decision and Order at 11, 23; *see*

[6] On appeal to the Board, Employer challenged ALJ Solomon's crediting of the pre-bronchodilator study based on its recency. The Board rejected Employer's argument and affirmed the determination that the December 2013 study is qualifying for total disability, and the pulmonary function study evidence as a whole establishes total disability.

[7] To the extent Employer argues the ALJ was required to render new, independent findings when determining whether there was a mistake of fact in ALJ Solomon's award of benefits, Employer's Brief at 7, we find no merit in this argument. An ALJ has broad discretion in determining whether there was a mistake of fact in a prior decision. *O'Keeffe*, 404 U.S. at 255. In doing so, he may choose to adopt the credibility findings in the prior decision. *Id*.

[8] Moreover, in its prior appeal to the Board Employer did not challenge ALJ Solomon's discrediting of Dr. McSharry's opinion that the December 2013 pre-bronchodilator study is not probative on the question of total disability, nor does it allege

Jessee, 5 F.3d at 725-26; *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).

Beyond Dr. McSharry's statements regarding reproducibility, Employer argues the December 26, 2013 study is not valid because it does not satisfy other quality standards at 20 C.F.R. §718.103 and Appendix B. Employer's Brief at 7-8. Employer asserts "the computer analysis of the test found the ATS Pre Criteria were not met and no plateau [was] reached on any of the trials recorded," and that "[t]here is no statement that the test was not administered during or soon after an acute respiratory illness . . . [even though Claimant] presented to the evaluation with worsening dyspnea, productive cough, hemoptysis, and wheezing." *Id*. at 8. Employer, however, did not argue to the ALJ that the study is invalid for these reasons. We will not consider such challenges for the first time on appeal. *See Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (party alleging objective study is invalid has a "two-part obligation at the hearing": "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable").

Finally, Employer generally argues the ALJ should have assigned controlling weight to the non-qualifying studies and, thus, should have found a mistake of fact. Employer's Brief at 8-9. Employer's argument amounts to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus we affirm the ALJ's finding that Employer failed to establish a mistake of fact with respect to ALJ Solomon's finding that the pulmonary function studies establish total disability, or a change in conditions based on new evidence. *See Jessee*, 5 F.3d at 725-26; 20 C.F.R. §§718.204(b)(2)(i), 725.310; Decision and Order at 11; Director's Exhibit 52 at 2-3, 8-9.

Arterial Blood Studies

ALJ Solomon found the arterial blood gas studies taken on January 18, 2011, May 24, 2011, May 10, 2012, and December 26, 2013 do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibit 52 at 2-3, 8-10. In considering Employer's request for modification, the ALJ found no mistake of fact with respect to that finding. Decision and Order on Modification at 20. The ALJ noted, however, that the parties submitted new blood gas testing in conjunction with the modification request. Decision and Order on Modification at 7, 20. Specifically, the record includes a non-qualifying April 9, 2015

in this appeal that ALJ Solomon committed a mistake in fact in finding Dr. McSharry's opinion not credible on that basis.

study and qualifying January 25, 2017 study. Employer's Exhibits 13, 17. The ALJ assigned controlling weight to the qualifying January 25, 2017 study because it was taken more recently and thus best reflects Claimant's current condition. Decision and Order on Modification at 20. Thus he found a change in conditions as Claimant is now totally disabled based on the blood gas testing. *Id*.

Employer challenges this finding, asserting Claimant performed the January 25, 2017 blood gas study during a hospitalization for an acute respiratory illness. Employer's Brief at 13-15. We consider error, if any, by the ALJ in weighing the blood gas evidence to be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Claimant established total disability based on the pulmonary function studies. Non-qualifying arterial blood gas studies do not call into question valid and qualifying pulmonary function studies because they measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993).

Medical Opinions

ALJ Solomon weighed the medical opinions of Drs. Burrell and Fernandes that Claimant is totally disabled and Drs. McSharry and Dahhan that he is not. Director's Exhibits 10; 25 (internally Claimant's Exhibit 2; Employer's Exhibits 3, 5, 7, 11); 59 at 10-15, 22. He discredited Dr. Fernandes's opinion because the doctor did not identify the exertional requirements of Claimant's usual coal mine employment. Director's Exhibit 59 at 13. He further discredited the opinions of Drs. McSharry and Dahhan because both doctors errantly focused on post-bronchodilator testing to opine Claimant is not totally disabled and failed to adequately address the December 26, 2013 pulmonary function study that produced qualifying values pre-bronchodilator. *Id*. Moreover, he found Dr. McSharry discussed total disability in general terms, and failed to specifically address whether Claimant is totally disabled from his shuttle car operator job. *Id*. In contrast, ALJ Solomon found Dr. Burrell's opinion well-reasoned and documented. *Id*. at 12-13.

In considering Employer's request for modification, the ALJ found no mistake of fact with respect to ALJ Solomon's findings. Decision and Order on Modification at 21.

The ALJ further noted that the parties submitted additional medical opinions in conjunction with the request for modification. Decision and Order on Modification at 21. Employer submitted additional medical reports and testimony from Drs. McSharry and Dahhan who opined Claimant is not totally disabled. Employer's Exhibits 14-15, 21. Claimant submitted a medical report from Dr. El-Chemeitelli, who opined he is totally disabled. Claimant's Exhibit 6; Employer's Exhibit 19. The ALJ found the new opinions of Drs. McSharry and Dahhan inadequately reasoned and based on a limited review of the evidence, but found Dr. El-Chemeitelli's opinion reasoned and documented and entitled to "significant weight." Decision and Order on Modification at 21-24. He also found the

parties submitted treatment record evidence, which he concluded supports a finding that Claimant is totally disabled. *Id*. at 23-24. Thus he found Employer failed to establish a basis for modification through new evidence. *Id*.

Employer does not challenge the ALJ's finding of no mistake of fact with respect to ALJ Solomon's decision to discredit the opinions of Drs. McSharry and Dahhan; nor does Employer challenge the ALJ's finding that the new medical opinions and deposition testimony of Drs. McSharry and Dahhan are not credible. Thus we affirm the ALJ's findings with respect to these doctors. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 21-25.

Employer asserts the ALJ erred in finding no mistake of fact in ALJ Solomon's decision to credit Dr. Burrell's total disability opinion. Employer's Brief at 11-12. It argues the ALJ found Claimant does not have clinical pneumoconiosis, and this finding undermines Dr. Burrell's opinion. *Id*. This argument has no merit. Dr. Burrell did not base his total disability opinion on a diagnosis of clinical pneumoconiosis. Claimant's Exhibit 10. Nor did ALJ Solomon credit Dr. Burrell's total disability opinion because it is consistent with a clinical pneumoconiosis finding. Director's Exhibit 59.

Dr. Burrell opined Claimant is totally disabled because he has severe "chronic pulmonary disease [that] would prevent [the] performance of his previous coal mine duties." Director's Exhibit 10. He specifically opined Claimant has "mild obstruction with FEV1 1.77 (68% of predicted)" and "hypoxemia with decreased p02 of 63." *Id*. ALJ Solomon found Dr. Burrell's opinion well-reasoned and documented because it is based on his "accurate understanding of Claimant's job duties, his physical examination, his review of Claimant's symptoms, medical history, social history, and the objective testing." Director's Exhibit 59 at 12-13. The ALJ permissibly found no mistake of fact in ALJ Solomon's credibility finding. *See Worrell*, 27 F.3d at 230; *Jessee*, 5 F.3d at 725-26; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order on Modification at 8, 21.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer failed to establish a mistake of fact or change in conditions with respect to the medical opinion evidence.[9] 20 C.F.R. §§725.310, 718.204(b)(2)(iv). We further affirm his findings that the evidence as a whole establishes total disability and invocation of the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b).

[9] Employer argues the ALJ erred in crediting Dr. El-Chemeitelli's opinion. Employer's Brief at 9-11; Claimant's Exhibit 6; Employer's Exhibit 19. Because the evidence in this case establishes total disability based on pulmonary function testing and the medical opinion of Dr. Burrell, any error by the ALJ in weighing Dr. El-Chemeitelli's opinion is harmless. *Larioni*, 6 BLR at 1-1278.

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 "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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015). The ALJ found Employer did not establish rebuttal by either method.[11]

Employer argues the ALJ erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 15-19. 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*, 25 BLR at 1-155 n.8.

Employer asserts the ALJ applied an incorrect legal standard by requiring its experts to "rule out" legal pneumoconiosis. Employer's Brief at 16-18. We disagree. The ALJ correctly stated that to rebut the presumption of legal pneumoconiosis, "Employer must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment, including chronic pulmonary disease . . . significantly related to, or significantly aggravated by, dust exposure in coal mine employment." Decision and Order on Modification at 29; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Moreover, the ALJ did not discredit the opinions of Drs. McSharry and Dahhan because they failed to satisfy an incorrect, heightened legal standard. Rather, he found their explanations for why Claimant does not have legal pneumoconiosis inadequately reasoned and inconsistent with the Act. Decision and Order on Modification at 30-33.

[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 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 rebutted the presumed existence of clinical pneumoconiosis. Decision and Order on Modification at 28.

Employer next argues the ALJ erred in discrediting Dr. McSharry's opinion on the issue of legal pneumoconiosis.[12] Employer's Brief at 18-19. We disagree. Dr. McSharry opined Claimant has an obstructive respiratory impairment due to asthma and cigarette smoking, and unrelated to coal mine dust exposure. Director's Exhibit 25 (internally Employer's Exhibits 3, 8); Employer's Exhibit 15. He explained Claimant does not have legal pneumoconiosis because "there are no abnormalities to suggest coal workers' pneumoconiosis" on Claimant's x-rays. Employer's Exhibit 15 at 32. He opined "it is possible to have pneumoconiosis and disabling pneumoconiosis without radiographic findings, [but] it's extremely unusual." *Id*. The ALJ permissibly found this reasoning "inconsistent with the Act, which recognizes that exposure to coal mine dust can result in disabling obstruction, even in the absence of x-ray or other findings of clinical pneumoconiosis." Decision and Order on Modification at 32; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

Dr. McSharry also opined Claimant's pulmonary function testing demonstrates significant improvement in his obstructive impairment after the administration of bronchodilators and excluded legal pneumoconiosis because coal mine dust exposure does not cause a reversible impairment. Director's Exhibit 25 (internally Employer's Exhibits 3, 8); Employer's Exhibit 15. The ALJ permissibly found this reasoning unpersuasive because Dr. McSharry failed to adequately explain why the irreversible portion of Claimant's impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order on Modification at 32.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to disprove Claimant has legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 33. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that

[12] Employer does not challenge the ALJ's finding that Dr. Dahhan's opinion is not credible on the issue of legal pneumoconiosis because it is inadequately reasoned and inconsistent with the Act. Thus we affirm this finding. *Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 30-33.

Claimant does not have pneumoconiosis.[13] *See* 20 C.F.R. §718.305(d)(1)(i). Thus we affirm the ALJ's finding that Employer failed to establish a mistake of fact with respect to ALJ Solomon's finding that it did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i), or a change in conditions based on new evidence. *See Jessee*, 5 F.3d at 725-26.

Disability Causation

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 on Modification at 33-34. The ALJ rationally discredited Drs. Dahhan's and McSharry's disability causation opinions because they failed to diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order on Modification at 34. We therefore affirm the ALJ's findings that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii). Further, we affirm the ALJ's finding that Employer failed to establish a mistake of fact with respect to ALJ Solomon's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii), or a change in conditions based on new evidence. *See Jessee*, 5 F.3d at 725-26.

Because Employer did not establish a mistake of fact or a change in conditions by rebutting the Section 411(c)(4) presumption, we affirm the ALJ's finding that Employer did not establish a basis to modify ALJ Solomon's award of benefits. Thus we affirm his denial of its request for modification. *See Rambo*, 521 U.S. at 139; *Stiltner*, 24 BLR at 1-38; 20 C.F.R. §725.310.

Commencement Date for Benefits

Benefits commence in the month a miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not

[13] To the extent Employer argues the ALJ erred in crediting the opinions of Drs. Burrell and Fernandes, we need not address its arguments. Employer's Brief at 11-12. Dr. Burrell opined Claimant has legal pneumoconiosis and Dr. Fernandes did not offer an opinion on the presence or absence of pneumoconiosis. Director's Exhibit 10; Claimant's Exhibit 4. Thus their opinions do not aid Employer in rebutting the presumption of legal pneumoconiosis or establishing a mistake of fact. 20 C.F.R. §725.310; *see Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

ascertainable from all the relevant evidence, benefits commence in the month the claim was filed, unless credited evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green*, 790 F.2d at 1119 n.4; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, benefits may not be paid for any period before the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

ALJ Solomon found "the medical evidence does not establish the date [Claimant] first became totally disabled due to pneumoconiosis," and thus awarded benefits commencing on the filing date of November 24, 2010. Director's Exhibit 59 at 22-23. The ALJ did not disturb that finding.

Employer argues the ALJ erred because the "uncontradicted medical evidence establishes [Claimant] was not totally disabled at some point after the claim was filed." Employer's Brief at 19-20. Employer, however, does not cite to any evidence the ALJ credited supportive of such a finding. The ALJ did not credit the non-qualifying January 18, 2011, May 24, 2011, and May 10, 2012 pulmonary function studies, as he found them outweighed by the qualifying December 26, 2013 study. Decision and Order on Modification at 20. He also discredited the opinions of Drs. Dahhan and McSharry that Claimant is not totally disabled. *Id*. at 21. Thus there is no merit to Employer's argument that the "uncontradicted" evidence establishes Claimant was not totally disabled on a date after the filing date. Employer's Brief at 19-20. We therefore reject Employer's argument that the ALJ should have modified the commencement date in this case. *Id*.

Accordingly, the ALJ's Decision and Order Denying Employer's Request for Modification is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge