**U.S. Department of Labor**

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

BRB No. 18-0247 BLA

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| HARRY W. ALDERSON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CLINCHFIELD COAL | ) | DATE ISSUED: 04/11/2019 |
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| Employer-Petitioner | ) | |
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| 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 Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05250) of Associate Chief Administrative Law Judge Paul R. Almanza (the administrative law

judge), rendered on a claim filed on November 28, 2012 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found that claimant has twenty-three years and one month of underground coal mine employment[1] and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). He further determined that employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant totally disabled, in invoking the Section 411(c)(4) presumption, and in finding that it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

## I. Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner is considered 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

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[1] Claimant's last coal mine employment was in Virginia. Hearing Transcript at 30; Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-three years and one month of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 18-19.

pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge 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 administrative law judge found that claimant established total disability based on the arterial blood gas studies and medical opinions at 20 C.F.R. §718.204(b)(2)(ii), (iv) and total disability at 20 C.F.R. §718.204(b)(2) when weighing the evidence as a whole.[4] Decision and Order at 21-24. Employer does not challenge the finding that the arterial blood gas studies establish total disability at 20 C.F.R. §718.204(b)(2)(ii). We therefore affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's argument that the administrative law judge failed to adequately consider the exertional requirements of claimant's job duties is without merit. Employer's Brief at 4-7. The administrative law judge found that claimant's usual coal mine employment was as a mine equipment demonstrator and maintenance worker. Decision and Order at 3-4. He acknowledged claimant traveled frequently, but found that traveling was not the only requirement of this job. *Id.* at 23. Based on claimant's testimony, he found claimant engaged in heavy lifting and demonstrated how to use equipment in underground mines, including operating a continuous miner and roof bolter. *Id.*

In determining the exertional requirements of claimant's usual coal mine employment, the administrative law judge should ascertain the exertional requirements of the most difficult job that claimant performed. *See Eagle v. Armco Inc.,* 943 F.2d 509, 512 n.4 (4th Cir. 1991). He cannot base a finding of exertional requirements solely on the least demanding aspects of a job. *Id.* We thus reject employer's argument that the administrative law judge should have found that claimant's job required "no physical exertion at all" because he traveled for a significant amount of time, and affirm the administrative law judge's finding that claimant was required to operate equipment and engage in heavy lifting as a mine equipment demonstrator and maintenance worker. Decision and Order at 23; Employer's Brief at 4-7.

We also reject employer's argument that the physicians whose opinions were credited by the administrative law judge lacked an adequate understanding of the miner's

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[4] The administrative law judge found that the pulmonary function studies do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 20-21. There is no evidence that claimant has cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii).

duties. Employer's Brief at 4-7. The administrative law judge noted that Drs. Gallai, McSharry, Green, and Habre reviewed claimant's pulmonary function and arterial blood gas testing and accurately identified claimant's job as mine equipment demonstrator and maintenance worker. Decision and Order at 10-14, 22-23; Director's Exhibits 11, 12; Claimant's Exhibits 2, 3. Dr. Gallai opined that claimant is totally disabled because of his reduced diffusion capacity, moderate obstructive lung disease, chronic bronchitis, chronic hyperventilation, and hypoxemia. Director's Exhibit 11. Dr. McSharry diagnosed total disability based on a moderate airflow obstruction, a reduced diffusion capacity, and hypoxemia. Director's Exhibit 12. Dr. Green opined that claimant is totally disabled because of his chronic airflow obstruction, a moderately reduced diffusing capacity, and significant resting hypoxemia. Claimant's Exhibit 2. Dr. Habre based his total disability diagnosis on claimant's dyspnea at rest, obstructive airflow, and chronic bronchitis. Claimant's Exhibit 3.

Contrary to employer's argument, the administrative law judge permissibly found that these physicians "consider[ed] the 'essential physical functions' of [an equipment] demonstrating job, including heavy lifting and operating mining equipment," and that their opinions are well-reasoned and documented.[5] Decision and Order at 21-23; *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). We thus affirm as supported by substantial evidence the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2)(iv).

Since employer has not raised any other allegations of error concerning the administrative law judge's finding under 20 C.F.R. §718.204(b)(2), we affirm his finding that claimant established total disability. Decision and Order at 24. Because claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, he invoked the presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 24.

## II. Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[6] or that "no

[5] As employer does not challenge the administrative law judge's finding that the contrary opinion of Dr. Rosenberg is entitled to little weight, this finding is affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 22.

[6] "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). "Clinical

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 that employer failed to establish rebuttal by either method.

**A. Legal Pneumoconiosis**

To disprove legal pneumoconiosis, employer must establish that 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) (Boggs, J., concurring and dissenting).

In determining that employer failed to meet its burden, the administrative law judge considered the medical opinions of Drs. McSharry and Rosenberg.[7] Decision and Order at 27-30. Both doctors diagnosed emphysema due to cigarette smoking and unrelated to coal mine dust exposure. Director's Exhibit 12; Employer's Exhibit 2. The administrative law judge found their explanations for excluding a diagnosis of legal pneumoconiosis unpersuasive and inconsistent with the regulations and the preamble to the 2001 revised regulations. Decision and Order at 27-30.[8]

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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).

[7] The administrative law judge also weighed the opinions of Drs. Gallai, Green, and Habre that claimant has an obstructive respiratory impairment due to coal mine dust exposure, and thus has legal pneumoconiosis. Decision and Order at 27-30. He found their opinions well-reasoned and documented. *Id*.

[8] As it is unchallenged, we affirm the administrative law judge's finding that Dr. Rosenberg's opinion is not well-reasoned. *See Skrack*, 6 BLR at 1-711; Decision and Order at 28-29. Even if employer's brief could be read as having raised a specific argument, substantial evidence supports the administrative law judge's credibility determination regarding Dr. Rosenberg. The administrative law judge correctly noted that Dr. Rosenberg excluded legal pneumoconiosis because it is "unlikely and unexpected for a coal worker who had no impairment upon leaving coal mining employment to develop 'legal [coal workers' pneumoconiosis]' years after leaving." *Id.*; Employer's Exhibit 2 at 3. The administrative law judge permissibly discredited this reasoning as inconsistent with the regulation at 20 C.F.R. §718.201(c), which provides that legal pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after

Employer asserts that the administrative law judge applied an incorrect legal standard by requiring Dr. McSharry to "rule out" coal mine dust exposure as a cause of claimant's respiratory impairment. *Id*. at 17-19. We disagree. The administrative law judge correctly stated that employer has the burden of establishing that claimant does not have legal pneumoconiosis, i.e., a chronic lung disease or impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 24, 27; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Moreover, he did not reject Dr. McSharry's opinion because it is insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, he found the opinion not credible because Dr. McSharry's rationale for excluding coal dust exposure as a cause of the impairment is inconsistent with the regulations and the preamble. Decision and Order at 28.

Substantial evidence supports the administrative law judge's credibility finding. Dr. McSharry opined that claimant "does not have a respiratory impairment [or] lung disease related to or aggravated by coal [mine] dust exposure" because "[h]is last exposure to coal and coal dust was more than 20 years ago." Director's Exhibit 12 at 3. Dr. McSharry explained that "[o]nly in the last 10 years has [claimant] developed symptoms of cough and sputum production and his wheezing is generally a more recent abnormality." *Id*. The administrative law judge permissibly discredited this reasoning as inconsistent with the regulation at 20 C.F.R. §718.201(c), which provides that legal pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion that is not in accord with the accepted view that pneumoconiosis is both latent and progressive may be discredited).

Dr. McSharry also opined that claimant's emphysema is due to cigarette smoking and unrelated to coal mine dust exposure because emphysema is a "common disease in the general population associated with smoking" and is "not seen in classic coal workers' pneumoconiosis." Director's Exhibit 12 at 3. The administrative law judge correctly noted, however, that the Department of Labor recognizes in the preamble that chronic obstructive pulmonary disease (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma. Decision and Order at 27, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The preamble further sets forth that COPD may be caused by coal mine dust exposure. 65 Fed. Reg. at 79,939. In light of the medical science relied upon by the DOL in the preamble, the administrative law judge permissibly found Dr. McSharry's rationale that coal mine dust does not cause emphysema to be unpersuasive. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir.

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the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); Decision and Order at 28-29.

2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); Decision and Order at 27-28.

We therefore affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A),[9] and his determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(1)(i).

**B. Disability Causation**

The administrative law judge next addressed whether employer established that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 31-32. The administrative law judge rationally discounted the disability causation opinions of Drs. McSharry and Rosenberg because neither physician diagnosed legal pneumoconiosis, contrary to his finding that employer failed to disprove the existence of the disease.[11] *See Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 31-32. We therefore affirm the administrative law judge's finding that employer failed

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[9] Because it is employer's burden to establish rebuttal, and the administrative law judge permissibly discredited the opinions of employer's doctors, we need not address employer's arguments regarding the opinions of Drs. Gallai, Green, and Habre that claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 19-22.

[10] Therefore we need not address employer's allegations of error in the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 7-13.

[11] We reject employer's argument that the administrative law judge cannot discredit the disability causation opinions of Drs. McSharry and Rosenberg for failing to diagnose legal pneumoconiosis where the disease is established by the Section 411(c)(4) presumption. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (in such circumstances, the administrative law judge may not credit a physician's disability causation opinion absent "specific and persuasive" reasons, and may give the opinion at most "little weight"); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (rejecting the employer's argument that the administrative law judge "erred by discrediting an opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found"); Employer's Brief at 22-23.

to establish that no part of claimant's total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge