U.S. Department of Labor

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

BRB No. 25-0086 BLA

TRUONG V. NGUYEN Claimant-Respondent v. AMBUSH MINING, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 02/06/2026 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William P. Farley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Joseph D. Halbert and Jason H. Halbert (Halbert Legal, PLLC), Lexington, Kentucky, for Employer.

David Casserly (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order Awarding Benefits (2021-BLA-05548) rendered on a claim filed on July 1, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the properly designated responsible operator. He also found Claimant established 26.40 years of underground coal mine employment and 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). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. It also argues he erred in finding Claimant is totally disabled and in invoking the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited response brief arguing there is no merit to Employer's responsible operator argument.

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 Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 26.40 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-9.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 17-18.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for at least one year.[4] 20 C.F.R. §§725.494(c), 725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The ALJ found Claimant last worked in coal mine employment for Employer in 2013, and that another subsequent employer, D.D.S. Leasing, Incorporated (DDS), did not employ Claimant as a coal miner. Decision and Order at 5-6, 10-11. Thus he found DDS does not meet the regulatory criteria to be a potentially liable operator. *Id.* He further determined that Employer has not established it is financially incapable of assuming liability. *Id.* Thus, he concluded Employer is the responsible operator. *Id.* at 11.

Employer argues that the ALJ erred in finding Claimant's work for DDS does not constitute coal mine employment. Employer's Brief at 6-10. Initially, the ALJ evaluated a letter from DDS indicating Claimant was a sales consultant "in charge of selling the coal for the contractors, which consisted of negotiating prices and determine [sic] where the coal would be sold." Decision and Order at 5 (quoting Director's Exhibit 38). The ALJ found the letter credible and indicative that Claimant did not engage in coal mine employment for DDS because the work of a sales consultant does not constitute the work of a coal miner. *Id.* at 5-6. He further found Claimant's testimony that he engaged in coal mining for DDS less credible than the letter based on Claimant's statements that he had diminished memory. *Id.*

[4] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Employer contends the ALJ erred in finding Claimant's testimony about his work for DDS is not credible. Employer's Brief at 6-10. We disagree.

Initially, we hold that Employer is precluded from relying on Claimant's testimony as liability evidence because it failed to timely designate him as a liability witness before the district director. The regulation set forth at 20 C.F.R. §725.414(c) provides:

> [A]ll parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the [ALJ] finds that the lack of notice should be excused due to extraordinary circumstances.

20 C.F.R. §725.414(c). The record does not reflect that Employer identified Claimant as a liability witness before the district director; nor does Employer allege it did so. Thus Employer is precluded from relying on Claimant's testimony on the responsible operator issue.[5] 20 C.F.R. §725.414(c). Thus, any error by the ALJ in weighing this testimony would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Regardless, even if Employer had designated Claimant as a liability witness, we would not disturb his credibility finding as it is supported by substantial evidence. When testifying about his employment history, Claimant indicated he had "a hard time remembering stuff." Hearing Tr. at 19. He testified his last year working for Employer was 2015. *Id*. But when asked on cross-examination if his last year working for Employer was actually 2013 and if his work with DDS was in 2015, he responded that he could not "remember for sure" and did not "remember that correctly." *Id.* at 31. Based on Claimant's statements about his memory, the ALJ permissibly found Claimant's testimony not credible. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); Decision and Order at 5-6.

Employer generally argues the ALJ should have found Claimant's testimony clear and credible and the letter from DDS not credible because the company was biased in order

[5] Where no party provides notice to the district director of the name and address of a witness whose testimony pertains to the liability of a potentially liable operator, the witness's testimony "will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c). Employer did not notice Claimant as a liability witness in this claim, nor did it argue extraordinary circumstances before the ALJ.

to avoid paying benefits. Employer's Brief at 6-10. But this argument is simply a request to reweigh the evidence. The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Stallard*, 876 F.3d at 670; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc).

We also reject Employer's argument that the ALJ selectively analyzed the evidence in determining that Claimant's hearing testimony is credible on the nature of his employment and job duties. Employer's Brief at 7-9. The ALJ may find Claimant's testimony less credible on one issue, but more specific and probative on another one. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305-06 (6th Cir. 2005); *Tackett*, 12 BLR at 1-14. Moreover, the ALJ evaluated Claimant's job duties based on his employment history forms alongside his hearing testimony. Director's Exhibits 3, 4, 25.

Because substantial evidence supports the ALJ's finding that Employer is the potentially liable operator that most recently employed Claimant for at least one year, we affirm it. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000). We therefore affirm his finding Employer is the properly designated responsible operator liable for payment of benefits in this claim.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 qualifying pulmonary function studies or arterial blood gas studies,[6] 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

[6] 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).

(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).

The ALJ found total disability based on the medical opinion evidence and the evidence as a whole.[7] Decision and Order at 29-33. Employer argues the ALJ erred. Employer's Brief at 4-6.

Before weighing the medical opinions, the ALJ found Claimant's usual coal mine employment was as an electrician-mechanic which required medium to heavy labor. Decision and Order at 9-10. As this finding is unchallenged on appeal, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ considered the medical opinions of Drs. Green, Nader, Shamma-Othman, Tuteur, and Fino. Decision and Order at 29-33. Drs. Green, Nader, and Shamma-Othman opined that Claimant is totally disabled by hypoxemia evidenced by arterial blood gas testing. Director's Exhibit 17; Claimant's Exhibits 7, 8. Drs. Tuteur and Fino opined that Claimant is not totally disabled and retains the capacity to perform his usual coal mine employment. Employer's Exhibits 3, 7, 12, 13. The ALJ found Dr. Shamma-Othman's opinion is not credible as the doctor did not review other objective testing beyond the qualifying August 2019 blood gas study and her own examination results. Decision and Order at 31-32. He found the opinions of Drs. Green and Nader are reasoned and documented but found Dr. Fino's opinion not credible because his report and findings are not in the record. *Id.* Finally, the ALJ found Dr. Tuteur's opinion less persuasive than Dr. Green's opinion because Dr. Tuteur did not adequately explain why Claimant is not totally disabled from hypoxemia evidenced by objective testing. *Id.*

Employer argues the ALJ shifted the burden of proof when evaluating the opinions of Drs. Green and Tuteur.[8] Employer's Brief at 4-5. We disagree.

The ALJ set forth his basis for finding Dr. Green's opinion more credible than Dr. Tutuer's, thereby meeting Claimant's burden of establishing total disability by a

[7] The ALJ found the pulmonary function study evidence, arterial blood gas study evidence, and Claimant's treatment record evidence do not support a finding of 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 28-29.

[8] Employer does not challenge the ALJ's decision to discredit Dr. Fino's opinion based on the absence of his report in the record or to find Dr. Nader's opinion reasoned and documented. Thus we affirm these findings. *See Skrack*, 6 BLR at 1-711.

preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). Dr. Green identified Claimant's usual coal mine employment as requiring lifting one-hundred pounds at any given time, rock dusting, shoveling belts, and working in "48-50 inch top" mines. Director's Exhibit 17 at 2. He characterized this work as heavy manual labor. *Id.* Further, he noted Claimant experiences shortness of breath walking uphill for ten yards. *Id.* He opined arterial blood gas testing establishes Claimant has hypoxemia at rest and significant hypoxemia at peak exercise. *Id.* at 3. As a result of his resting hypoxemia and significant exercise-induced hypoxemia, he concluded Claimant is totally disabled from his usual coal mine employment. *Id.* at 3-4. The ALJ permissibly found Dr. Green's opinion is reasoned and documented and entitled to greater weight because he "based his opinion on objective testing and a comprehensive understanding of Claimant's condition." Decision and Order at 31; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1997); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

In contrast, the ALJ noted that Dr. Tuteur excluded total disability because the pulmonary function and arterial blood gas studies he reviewed are not qualifying under the regulations. Decision and Order at 31-32; Employer's Exhibits 3, 7, 13. Although the ALJ acknowledged Dr. Tuteur reviewed a large body of evidence, he nonetheless found the doctor's conclusion unpersuasive. *Id.* Noting that even non-qualifying blood gas testing showed Claimant experiences "low oxygenation" values, Decision and Order at 32 (quoting Employer's Exhibit 6 at 3-4), the ALJ permissibly found Dr. Tuteur did not adequately explain why the "low oxygenation" values did not render Claimant totally disabled from his usual coal mine employment, even if the arterial blood gas testing is non-qualifying. *Id.*; *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); 20 C.F.R. §718.204(b)(2)(iv). Although Employer argues Dr. Tuteur adequately explained his conclusion, its argument constitutes 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); Employer's Brief at 4-5.

Employer argues the ALJ erred in crediting Dr. Green's medical opinion because he, like Dr. Shamma-Othman, did not review other objective testing. Employer's Brief at 4-5. We disagree. An ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner and objective test results. *See Smith v. Kelly's Creek Res.*, 26 BLR 1-15, 1-28 (2023); *Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Moreover, the ALJ explained why Dr. Green's opinion is entitled to controlling weight as he found the doctor "based his opinion on objective testing and a

comprehensive understanding of Claimant's condition." Decision and Order at 31; *see Hicks*, 138 F.3d at 528.

Because substantial evidence supports the ALJ's determination, we affirm his finding that Claimant established total disability through the medical opinions of Drs. Green and Nader. Decision and Order at 29-33; 20 C.F.R. §718.204(b)(2)(iv). Further, we affirm the ALJ's finding Claimant established total disability in consideration of the evidence as a whole, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and therefore invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1). As Employer does not challenge the ALJ's finding it failed to rebut the Section 411(c)(4) presumption, we affirm this finding. *Skrack*, 6 BLR at 1-711.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge