U.S. Department of Labor

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

BRB Nos. 23-0297 BLA
and 23-0418 BLA

CARLOS D. MATHERLY Claimant-Respondent v. MINGO LOGAN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/29/2025 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees and Costs of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Scott A. White (White & Risse, LLC), Arnold, Missouri, for Employer.

William M. Bush (Emily Su, Deputy Solicitor for the National Office; Jennifer Feldman Jones, Acting Associate Solicitor; Andrea J. Appel, 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, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees and Costs (2020-BLA-05919) rendered on a subsequent claim[1] filed on February 22, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with more than twenty years of underground coal mine employment based on the parties' stipulation and found he established a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Therefore, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). She also determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution.[4] It further asserts the removal provisions applicable to the ALJ render her

[1] The district director denied Claimant's prior claim filed on October 8, 2011, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant subsequently filed another claim for benefits, which he later withdrew. Director's Exhibit 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[2] 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.

[3] When a claimant files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for failing to establish any element of entitlement, Claimant had to establish at least one element of entitlement to obtain review of the merits of his claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established total disability, thereby invoking the Section 411(c)(4) presumption. Employer further argues the ALJ erred in finding it did not rebut the presumption. Finally, it challenges the ALJ's award of attorney's fees. Claimant responds in support of the award of benefits and attorney's fees.[5] The Director, Office of Workers' Compensation Programs, responds, urging rejection of Employer's constitutional arguments. He also asserts the ALJ permissibly relied on the preamble to the 2001 revised regulations in weighing the medical opinions and properly found Employer failed to rebut the Section 411(c)(4) presumption.

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.[6] 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 (1965).

Appointments Clause/Removal Provisions

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. 237 (2018).[7] Employer's Brief at 25-32. It acknowledges the Secretary of Labor

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> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least twenty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 8.

[6] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14.

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (citing *Freytag v. Comm'r*,

ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* at 26-32. For the reasons set forth in *Johnson v. Apogee Coal Co.*, 26 BLR 1-1, 1-5-7 (2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), we reject Employer's Appointments Clause arguments.

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 32-33. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia* and the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). *Id.* at 26-28. In *Howard v. Apogee Coal Co.*, 25 BLR 1-301 (2022), the Board rejected similar arguments, in part, because the employer did not sufficiently allege "it suffered any harm due to the ALJ's removal protections." 25 BLR at 1-307 (applying *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022)). Subsequently, in *K&R Contractors, LLC v. Keene*, 86 F.4th 135, 145 (4th Cir. 2023), the Fourth Circuit, within whose jurisdiction this claim arises, held that "the Board has no authority to remedy the alleged separation-of-powers violation." The court nevertheless denied the employer's request for a new hearing because it did not show that the alleged "constitutional violation caused [it] harm." *Keene*, 86 F.4th at 149. So too here. Thus, even if the Board had authority to remedy the violation presented by Employer's removal protections arguments, we would decline to do so because Employer has failed to identify a harm.

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501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's Dec. 21, 2017 Letter to ALJ Lystra A. Harris.

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 or comparable gainful work. 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). The ALJ found Claimant established total disability based on the medical opinions and the evidence as a whole.[9] Decision and Order at 36; 20 C.F.R. §718.204(b)(2)(iv).

Usual Coal Mine Work

Initially, Employer argues the ALJ erred in finding Claimant's usual coal mine work required heavy to very heavy exertion, arguing the ALJ focused on the "hardest part" of Claimant's work rather than his usual tasks. Employer's Brief at 39-41. We disagree.

The ALJ considered Claimant's testimony, Form CM-913 Description of Coal Mine Work, and coal mine employment history reported in the medical opinions. Decision and Order at 8-9. The ALJ found that Claimant's usual coal mine employment was working as a trackman.[10] *Id.* at 9. Claimant testified his job as a trackman involved laying railroad tracks in the mines daily. Hearing Transcript at 15-17; Director's Exhibit 7. He explained this work required multiple people to carry twenty-foot rails and hammer them down to railroad ties using four-pound spike hammers. Hearing Transcript at 15-16. Further, he testified they would also unload the railroad ties, which weighed about 120 to 130 pounds each, by hand. *Id.* at 16. Drs. Habre and Zaldivar recorded Claimant's job as a trackman, and Drs. Rajbhandari and Rosenberg noted he was required to lift over 100 pounds. Director's Exhibits 22, 24; Claimant's Exhibit 1; Employer's Exhibit 12. Based on the

[9] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 12-17.

[10] Employer does not contest that Claimant's usual coal mine employment was working as a trackman; thus, we affirm that finding. *See Skrack*, 6 BLR at 1-711; Employer's Brief at 3, 40.

foregoing, the ALJ found Claimant's usual coal mine job required heavy to very heavy exertion. Decision and Order at 9.

As the factfinder, the ALJ is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). The ALJ considered Claimant's uncontradicted testimony and other evidence of record and permissibly found his usual coal mine work as a trackman required heavy to very heavy labor. Decision and Order at 9-10. Thus, we affirm the ALJ's finding as supported by substantial evidence. *See Stallard*, 876 F.3d at 670; *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

Medical Opinions

Total disability may be established based on a physician's reasoned opinion that a miner's respiratory or pulmonary condition prevents him from performing his usual coal mine employment, even when objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment).

The ALJ considered the medical opinions of Drs. Habre, Rajbhandari, Rosenberg, and Zaldivar. Decision and Order at 18-36. Drs. Habre and Rajbhandari found Claimant is incapable of performing his usual coal mine employment. Director's Exhibits 24, 29; Claimant's Exhibits 1, 4. Dr. Rosenberg ultimately opined Claimant could not perform his usual coal mine employment with his untreated airways disease, while Dr. Zaldivar concluded he could do heavy work based on the most recent pulmonary function study that was "very close to normal." Employer's Exhibits 13 at 39, 14 at 9.

The ALJ found Drs. Habre's and Rajbhandari's opinions well-reasoned and consistent with the evidence they considered. She further found that while Dr. Rosenberg conflated the issues of disability and disability causation, his opinion that Claimant cannot perform his usual coal mine employment without treatment supports a finding of total disability. Decision and Order at 34-36. Finally, she found Dr. Zaldivar's opinion inadequately explained. *Id.* at 34. Thus, she found the medical opinion evidence supports a finding of total disability. *Id.* at 36.

Employer contends the ALJ erred in crediting Drs. Habre's and Rajbhandari's opinions even though they did not consider the most recent, non-qualifying[11] pulmonary function study. Employer's Brief at 34, 40. Contrary to Employer's assertion, an expert need not consider all the evidence of record for an ALJ to find their opinion well-reasoned and documented. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (that a physician reviewed less data in forming his opinion does not render his opinion insufficient to establish total disability); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 51- 52 (4th Cir. 1992) (it is irrational to credit later evidence solely on the basis of recency if that evidence shows a miner's condition has improved); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-50-51 (2023).

Dr. Habre opined Claimant could not perform heavy labor based on a decline in the FEV1 and FVC values in the March 26, 2019 and October 30, 2019 pulmonary function studies. Decision and Order at 34; Director's Exhibits 24, 29. The ALJ found Dr. Habre also explained that even after Claimant was given bronchodilator medication, the post-bronchodilator values were "just barely above" qualifying and thus would not enable him to perform work such as carrying more than fifty pounds during a long shift. Decision and Order at 34; Director's Exhibits 29, 71 at 33-34. Similarly, Dr. Rajbhandari opined Claimant could not perform his usual coal mine employment, which required lifting over 100 pounds "at any given time," based on pulmonary function studies Dr. Rajbhandari conducted on December 23, 2020, and January 11, 2021, showing "severely" reduced FEV1, MVV, and diffusion capacity values. Decision and Order at 27-29, 35; Claimant's Exhibits 1, 4.

Thus, the ALJ permissibly found Drs. Habre's and Rajbhandari's opinions well-reasoned and documented as they are consistent with the objective testing they considered, their examinations of Claimant, and their understanding of Claimant's usual coal mine employment.[12] *See Compton*, 211 F.3d at 211 (it is the province of the ALJ to evaluate the physicians' opinions); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (a

[11] A "qualifying" pulmonary function study yields results that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[12] Employer also generally argues the ALJ failed to address that the physicians relied on pulmonary function studies of "suspect" quality, "non-qualifying diffusing capacities," and "questionable" arterial blood gas studies which "normalized" at sea level. Employer's Brief at 33-35. Even assuming Employer adequately briefed the issue, it failed to raise any such arguments before the ALJ; thus, we decline to address them. *See* 20 C.F.R. §802.211(b); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (issues must be raised before the ALJ to preserve review before the Board).

reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion); Decision and Order at 19-22, 27-29, 34-35.

Employer also generally argues the ALJ erred in not according Drs. Zaldivar's and Rosenberg's opinions "the weight they deserved," asserting they reviewed the entirety of the evidence and their opinions are better-reasoned and documented than those of the other experts. Employer's Brief at 33, 36. It contends the ALJ seemed to simply "count heads." *Id.* at 36. Employer's arguments are unpersuasive.

Dr. Rosenberg first opined Claimant is not totally disabled but later concluded he has a disabling respiratory impairment. Employer's Exhibits 12 at 12-13; 13 at 39. While noting the most recent pulmonary function study showed improvement in Claimant's pulmonary function, especially after the administration of bronchodilators, Dr. Rosenberg agreed that Claimant's "periodically disabling" results indicate he would not be able to do heavy manual labor "with untreated hyperactive airways." Employer's Exhibit 13 at 30-31, 39. Thus, the ALJ permissibly found Dr. Rosenberg's opinion supports a finding of total disability given that he opined Claimant cannot perform his usual coal mine work without treatment. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (DOL has cautioned against reliance on post-bronchodilator pulmonary function test results in determining total disability, stating that "the 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."); *Hicks*, 138 F.3d at 528; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 36; Employer's Exhibit 13 at 39-40.

Dr. Zaldivar initially opined Claimant is totally disabled based on the March 26, 2019 and October 30, 2019 pulmonary function studies. Director's Exhibit 22. After considering the additional pulmonary function studies conducted on December 23, 2020, January 11, 2021, and November 3, 2021, he noted a "wide disparity" in the results due to "inflammation of the lungs."[13] Employer's Exhibit 14 at 9-11. However, he opined Claimant has the respiratory capacity to perform even "very heavy" manual labor because the most recent study Dr. Zaldivar conducted on November 3, 2021, produced values

[13] The March 26, 2019 and October 30, 2019 pulmonary function studies were qualifying without the administration of bronchodilators, but were non-qualifying after the administration of bronchodilators. Director's Exhibits 22, 24. The December 23, 2020 and January 11, 2021 pulmonary function studies were qualifying without the administration of bronchodilators and no bronchodilator was administered. Claimant's Exhibits 1, 4. Finally, the November 3, 2021 pulmonary function study was non-qualifying, both before and after the administration of bronchodilators. Employer's Exhibit 11.

"close to normal" and Claimant's improvement with bronchodilators indicates no "permanent damage" to the lungs. Employer's Exhibit 14 at 9, 12.

The ALJ acted within her discretion to find Dr. Zaldivar did not adequately explain how Claimant can regularly perform heavy manual labor given the acknowledged variability in his lung function. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 34; Employer's Exhibit 14 at 9-11. She further permissibly found Dr. Zaldivar's opinion undermined given his reliance on Claimant's pulmonary function after the administration of a bronchodilator because "when making disability determinations, the question is whether the miner is able to perform his job, not whether he is able to perform his job after he takes medication." Decision and Order at 36 (citing 45 Fed. Reg. at 13,682); *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.

Finally, to the extent Employer argues the ALJ failed to address its experts' explanations that Claimant suffers a ventilatory impairment due to factors such as advanced age and heart disease, Employer's Brief at 41, the ALJ permissibly found such opinions and arguments conflate the issues of total disability and causation.[14] *See Island Creek Coal Co. v. Blankenship*, 123 F.4th 684, 691-92 (4th Cir 2024) (ALJ erred in conflating distinct issues of total disability, pneumoconiosis, and total disability); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson*, 26 BLR at 1-5-7 (relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305); Decision and Order at 35.

As Employer raises no further arguments on the issue, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(iii); Decision and Order at 36.

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,[15] or "no part of

[14] Insofar as Employer argues Claimant is not entitled to benefits because a back injury prevented him from working in the mines, we also reject this argument for the reasons stated in *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-318 (2022). *See* Employer's Brief at 39, 43 (citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994)).

[15] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition

[his] respiratory or pulmonary total disability is 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 did not establish rebuttal by either method.[16]

Legal Pneumoconiosis

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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Zaldivar's and Rosenberg's opinions that Claimant does not have legal pneumoconiosis.[17] Employer's Brief at 25-44. Noting the improvement of Claimant's pulmonary function with the administration of bronchodilators and over time, Dr. Zaldivar diagnosed Claimant with asthma unrelated to coal mine dust exposure. Director's Exhibit 22 at 34; Employer's Exhibit 14 at 11-12. Dr. Rosenberg diagnosed Claimant with a disabling respiratory impairment due to asthma and aortic stenosis resulting in pulmonary hypertension, unrelated to coal mine dust exposure. Employer's Exhibits 12 at 11-13; 13 at 19-24, 38-39. The ALJ found the physicians' opinions inadequately reasoned and thus insufficient to disprove legal pneumoconiosis. Decision and Order at 41-45.

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includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[16] The ALJ found Employer rebutted the presence of clinical pneumoconiosis. Decision and Order at 47. Thus, we need not address Employer's contentions of error relevant to this issue. *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").

[17] Employer argues the ALJ erred in crediting Drs. Habre's and Rajbhandari's opinions that Claimant has legal pneumoconiosis. Employer's Brief at 36. However, their opinions do not support Employer's rebuttal burden. Decision and Order at 41; Director's Exhibits 24, 29, 71; Claimant's Exhibits 1, 4. Thus, we need not address these arguments.

Employer generally contends the ALJ erred in relying on the principles underlying the preamble to the 2001 revised regulations in assessing the medical opinion evidence. Employer's Brief at 32-33. It further contends the ALJ erred in discrediting Drs. Zaldivar's and Rosenberg's opinions as she failed to consider that pneumoconiosis is not always latent and progressive. *Id.* at 36-37.

Initially, contrary to Employer's contention, the ALJ permissibly consulted the medical principles underlying the preamble to the 2001 revised regulations when considering the credibility of the medical opinion evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

Further, the ALJ permissibly applied the regulation recognizing pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure" to find unpersuasive Drs. Zaldivar's and Rosenberg's reliance on the remoteness since Claimant last worked in coal mine employment as a basis to exclude legal pneumoconiosis.[18] 20 C.F.R. §718.201(c)(1); *see* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); *see also Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739 (6th Cir. 2014) (Act recognizes that pneumoconioses, whether clinical or legal, can first become detectable after a miner ceases coal mine employment); Decision and Order at 42-44.

Moreover, the ALJ found that, even if Claimant's impairment was due to asthma, Dr. Zaldivar did not adequately explain how he concluded that coal mine dust did not significantly contribute to or aggravate this condition, a finding Employer does not contest. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,939 (noting "valid support [exists in the record] for the proposition that coal mine dust exposure can cause obstructive pulmonary disease" and chronic obstructive pulmonary disease includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma); *Mingo Logan Coal*

[18] Dr. Zaldivar asserted there is a lack of scientific evidence showing legal pneumoconiosis is latent and progressive. Director's Exhibit 22 at 34. Dr. Rosenberg excluded legal pneumoconiosis, in part, because Claimant developed a respiratory impairment "decades" after his coal mine employment ended. Employer's Exhibits 12 at 11-13; 13 at 27.

Co. v. Owens, 724 F.3d 550, 555 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; Decision and Order at 42, 44.

Similarly, Employer has not challenged the ALJ's finding that, while Dr. Rosenberg indicated other causes of Claimant's impairment and explained that latency is "rare" in pneumoconiosis, Dr. Rosenberg did not adequately explain why Claimant could not be one of the allegedly rare cases or why coal mine dust could not have aggravated his other conditions. *See Skrack*, 6 BLR at 1-711; *see also Owens*, 724 F.3d at 555; *Looney*, 678 F.3d at 316; *Hicks*, 138 F.3d at 533; Decision and Order at 44.

Because the ALJ provided valid reasons for discrediting Drs. Zaldivar's and Rosenberg's opinions, we affirm her finding that Employer failed to disprove legal pneumoconiosis. *See Minich*, 25 BLR at 1-155 n.8; *Skrack*, 6 BLR at 1-711. Therefore, we affirm her finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 47. 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).

Disability Causation

The ALJ next considered whether Employer established "no part of the [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 48-39. Employer generally argues the evidence does not establish that pneumoconiosis contributed to Claimant's impairment absent the Section 411(c)(4) presumption. Employer's Brief at 41-44. However, we have affirmed the ALJ's finding that Claimant invoked the presumption. Further, the ALJ permissibly discredited Drs. Zaldivar's and Rosenberg's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease. *See Epling*, 783 F.3d at 504-05; Decision and Order at 47-48. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we affirm the award of benefits.

Attorney Fee Award

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 568-69 (4th Cir. 2013); *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Claimant's counsel (Counsel) submitted an itemized fee petition requesting $5,062.50 in fees for legal services performed from July 7, 2020, to March 20, 2023, representing $2,362.50 for 6.75 hours of legal services performed by Joseph E. Wolfe, Esq., at the hourly rate of $350.00; $1,100.00 for 5.50 hours of legal services performed by Brad Austin, Esq., at the hourly rate of $200.00; $600.00 for four hours of legal services performed by Rachel Wolfe, Esq., at the hourly rate of $150.00; and $1,000.00 for ten hours of hours of legal services performed by Counsel's legal assistants at the hourly rate of $100.00, plus $3,582.66 in costs.

After considering the fee petition, Employer's objections, and the regulatory criteria at 20 C.F.R. §725.366, the ALJ found Mr. Wolfe's requested hourly rate of $350.00 unreasonable and reduced it to $325.00, but she found the rest of the requested hourly rates representative of the prevailing market rate and commensurate with the attorneys' qualifications and the work performed. Supplemental Decision and Order Awarding Attorney's Fees and Costs (Fee Order) at 2-6 (unpaginated). She reduced certain requested time entries to disallow compensation for clerical tasks but otherwise found the remaining time entries reasonable and awarded Counsel $4,425.00 in fees and $3,582.66 in costs, for a total of $8,007.66. *Id.* at 6.

Hourly Rate

Under fee-shifting statutes, the United States Supreme Court has held that courts must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *See Gosnell,* 724 F.3d at 572.

An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11.

Employer argues the ALJ erred in determining the prevailing market rate for Mr. Wolfe, which should be "no more" than $300.00 per hour.[19] Employer's Brief at 45-51, 58. We disagree.

In evaluating the prevailing market rate, the ALJ considered Mr. Wolfe's seventy prior fee awards granting hourly rates between $300.00 and $420.00. Fee Order at 3 (unpaginated). She also considered the National Law Journal 2014 Survey of Law Firm Economics, which indicated the hourly rate for attorneys in the South Atlantic region with experience similar to Mr. Wolfe's is $426.00. *Id.* at 3. The ALJ further noted, however, that Mr. Wolfe did not provide evidence to support his suggestion that the complexity of this case warrants a higher hourly rate and found the issues not sufficiently complex to warrant $350.00 per hour. *Id.* Thus, based on the previous fee awards and comparing them to the regional survey, the ALJ found an hourly rate of $325.00 for Mr. Wolfe to be reasonable and consistent with the prevailing market rate in the relevant community for attorneys with similar experience, skill, and education. *Id.* at 3-4.

Contrary to Employer's argument, evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See Gosnell*, 724 F.3d at 572. Here, the ALJ did not rely solely on past fee awards to determine the market rate – she also considered Mr. Wolfe's experience and the complexity of the legal issues in this case and compared his requested rate to the rates listed in a regional survey of similarly experienced practicing attorneys.[20] *See* Fee Order at 3-4 (unpaginated); *Gosnell*, 724 F.3d at 575 n.12. Thus, we affirm the ALJ's finding that an hourly rate of $325.00 is reasonable for Mr. Wolfe's services performed in this case.

Employer also challenges the ALJ's finding the requested hourly rate of $100.00 for legal assistant services is reasonable. Employer's Brief at 57. Its argument is unpersuasive. The ALJ found the $100.00 hourly rate reasonable, noting a previous fee award by the Board approving this rate and multiple awards at that rate from the Office of Administrative Law Judges. Fee Order at 4 (unpaginated); Counsel's Fee Petition at 2-10.

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[19] Employer contends it is "unclear" why Mr. Austin's requested hourly rate is higher than Ms. Wolfe's given they have "roughly" the same experience. Employer's Brief at 50. However, Employer does not allege any specific error committed by the ALJ in determining the reasonableness of Mr. Austin's and Ms. Wolfe's hourly rate requests. We therefore decline to address this issue as inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986).

[20] Employer also argues that the "passage of time" is not a basis to justify Mr. Wolfe's hourly rate; however, it fails to cite to where the ALJ relies on such a justification. *See* Employer's Brief at 58.

Because Employer's only basis for its argument is two cases in which the legal assistants were awarded $75.00 per hour, it has not shown how the ALJ abused her discretion in finding $100.00 is a reasonable hourly rate based on numerous other prior awards. *See Gosnell*, 724 F.3d at 572-76. Therefore, we affirm the ALJ's finding that an hourly rate of $100.00 is reasonable for the legal assistant services performed in this case.

Billable Hours

Employer challenges Mr. Wolfe's use of quarter-hour billing when performing allegedly routine tasks. Employer's Brief at 51-53. It asserts Mr. Wolfe's quarter-hour billing for such tasks by is "excessive on its face." *Id.* Contrary to Employer's contention, an ALJ may award a fee based on quarter-hour minimum increments. *See Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666-67. Moreover, the ALJ considered each time entry and subtracted the time spent on clerical tasks. Fee Order at 4-5 (unpaginated). Accordingly, we reject Employer's argument that the ALJ abused her discretion in permitting quarter-hour billing. *See Bentley*, 522 F.3d at 666-67.

Employer also objects to specific time entries from Mr. Wolfe, Mr. Austin, Ms. Wolfe, and the legal assistants, contending that the hours requested do not accurately reflect the amount of work required for certain tasks. Employer's Brief at 54-57. As Employer fails to allege any specific error, we conclude that the ALJ acted within her discretion in allowing the time entries.[21] *See Gosnell*, 724 F.3d at 576-77 ("substantial deference" given to the ALJ's conclusions regarding whether hours represented in a fee petition are excessive).

Reimbursable Expenses

Employer asserts the ALJ erred in awarding reimbursement for travel expenses of $313.26 that Claimant incurred to attend his independent medical examinations at Norton Community Hospital. Employer's Brief at 57. It contends the regulations allow reimbursement for travel incurred only by a "representative" or "employee of a representative." *Id.* Contrary to Employer's contention, the ALJ rationally applied 20 C.F.R. §725.366(c)[22] to find Claimant's travel costs were compensable as reasonable,

[21] We note that at least some of the time entries Employer objects to were already excluded by the ALJ. *Compare* Employer's Brief at 54-55 *to* Fee Order at 5-6 (unpaginated).

[22] Section 725.366(c) provides, in part, that "in awarding a fee, the appropriate adjudication officer shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case." 20 C.F.R. §725.366(c).

unreimbursed expenses incurred in establishing his case; thus, the reimbursement of these costs is affirmed. *See Jones*, 21 BLR at 1-108; Fee Order at 6 (unpaginated).

Further, as Employer does not challenge the ALJ's award of the remaining expenses, we affirm her award of $3,582.66 in expenses. *See Skrack*, 6 BLR at 1-711; Fee Order. We therefore affirm the ALJ's attorney fee award.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees and Costs.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge