

U.S. Department of Labor

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



BRB No. 24-0212 BLA

JERRY R. LINVILLE

Claimant-Respondent

v.

ELKAY MINING COMPANY

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR

Party-in-Interest

**NOT-PUBLISHED**

DATE ISSUED: 01/30/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Patricia J. Daum,  
Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for  
Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES,  
Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits (2020-BLA-05529) rendered on a claim filed on May 2, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).<sup>1</sup>

The ALJ found Claimant established 19.36 years of qualifying coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).<sup>2</sup> The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> Claimant filed a prior claim for benefits, but the Federal Records Center destroyed the record for that claim on December 31, 2007. Decision and Order at 2, *citing* Director's Exhibit 1. Because Claimant's prior claim record is unavailable, the ALJ treated this subsequent claim like an initial claim. Decision and Order at 3.

<sup>2</sup> 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); *see* 20 C.F.R. §718.305(b).

<sup>3</sup> 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20.

### **Rebuttal of the Section 411(c)(4) Presumption**

Because Claimant invoked the Section 411(c)(4) presumption,<sup>4</sup> the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis<sup>5</sup> 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). The ALJ found Employer disproved clinical pneumoconiosis but did not rebut the existence of legal pneumoconiosis or establish that no part of Claimant’s total disability is caused by legal pneumoconiosis.

### **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.” See 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Basheda’s and Zaldivar’s opinions that Claimant does not have legal pneumoconiosis. Employer’s Exhibits 1-2, 5-6. The ALJ found their opinions unpersuasive and insufficient to satisfy Employer’s burden of proof.<sup>6</sup> Decision and Order

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<sup>4</sup> We affirm, as unchallenged on appeal, the ALJ’s findings that Claimant established 19.36 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and thus invoked the Section 411(c)(4) presumption. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 9, 27.

<sup>5</sup> “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 that is 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).

<sup>6</sup> Contrary to Employer’s characterizations, the ALJ did not find the opinions of Drs. Basheda and Zaldivar hostile to the Act; therefore, we need not address Employer’s arguments on that issue. See Employer’s Brief at 12.

at 32-34. Employer argues the ALJ's credibility findings lack sufficient explanation and are not supported by substantial evidence. Employer's Brief at 8-15. We disagree.

Dr. Basheda opined Claimant has an obstructive respiratory impairment that responds to bronchodilators, consistent with asthma. Employer's Exhibit 6 at 7. Dr. Basheda attributed Claimant's obstructive impairment to uncontrolled and untreated asthma and opined it is not related in any way to his coal dust exposure. *Id.* at 25-26. The ALJ permissibly found Dr. Basheda failed to adequately explain why Claimant does not have legal pneumoconiosis after acknowledging that legal pneumoconiosis and asthma are not mutually exclusive and that a bronchodilator response does not preclude a diagnosis of legal pneumoconiosis. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (ALJ may discount a physician's opinion for failure to adequately explain why Claimant's pulmonary impairment was not "significantly related to, or substantially aggravated by," his coal mine dust exposure); *Harman Mining Co. v. Director, OWCP v. Looney*, 678 F.3d 305, 313-14 (4th Cir. 2012) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure"); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ may reject medical opinion when the doctor failed to adequately explain his or her diagnosis); *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); Decision and Order at 34; Employer's Exhibit 6 at 7-8, 11, 16-18, 20-21, 26-27, 29-31, 33, 35, 40-41; *see also* Employer's Exhibit 1.

Dr. Zaldivar also opined that Claimant has untreated asthma unrelated to coal mine dust exposure. Employer's Exhibit 2 at 7-8; *see also* Employer's Exhibit 5 at 52-53, 60. As the ALJ accurately noted, Dr. Zaldivar eliminated a diagnosis of legal pneumoconiosis, in part, because Claimant does not have radiographic evidence of clinical pneumoconiosis. *Id.* The ALJ permissibly found Dr. Zaldivar's opinion inconsistent with the regulatory definition of legal pneumoconiosis, which does not require the presence of clinical pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.202(a)(4); *Looney*, 678 F.3d at 313; *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 256-57 (3d Cir. 2011); Decision and Order at 33; Employer's Exhibit 2 at 7-8; *see also* Employer's Exhibit 5 at 52-53, 60.

We see no error in the ALJ's permissible finding that Drs. Basheda and Zaldivar "failed to adequately explain why the Claimant's significant history of coal dust exposure was not a contributing or aggravating factor to his disabling respiratory impairment." *See Owens*, 724 F.3d at 558; *Looney*, 678 F.3d at 313-14; Decision and Order at 34; Employer's Exhibits 1, 2, 5, 6.

Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ explained his credibility findings as the Administrative Procedure Act requires, we affirm as supported by substantial evidence the ALJ's conclusion that Employer did not disprove that Claimant has legal pneumoconiosis.<sup>7</sup> *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 34. 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 that "no part of the miner'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 34-36. She permissibly discounted the opinions of Drs. Basheda and Zaldivar regarding the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of the disease.<sup>8</sup> *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (causation opinion that erroneously fails to diagnose pneumoconiosis may not be credited at all absent "specific and persuasive reasons" that the physician's judgment does not rest

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<sup>7</sup> Employer argues the ALJ erred in failing to resolve the conflict in the evidence regarding Claimant's smoking history; however, we consider the ALJ's error, if any, to be harmless as he did not discredit the opinions of Employer's experts regarding legal pneumoconiosis based on their understanding of Claimant's smoking history. *See Shinseki v. Sanders*, 556 US. 396, 413 (2009) (holding the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 22-25. Because the ALJ provided at least one valid reason for discrediting the opinions of both of Employer's experts, we need not address Employer's contentions that the ALJ mischaracterized other aspects of their opinions in finding them inconsistent with the preamble to the 2001 regulatory revisions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Having affirmed the ALJ's discrediting of the opinions of Employer's experts and because Employer has the burden of proof, we decline to address Employer's arguments regarding the weight accorded the opinions of Drs. Forehand, Agarwal, and Green that Claimant has legal pneumoconiosis. Employer's Brief at 16-22.

<sup>8</sup> Drs. Basheda's and Zaldivar's opinions as to whether Claimant's respiratory disability was related to legal pneumoconiosis rested on their assumption that he did not have legal pneumoconiosis. *See* Employer's Exhibits 1, 2, 5, 6.

upon the misdiagnosis, in which case the opinion is entitled to at most “little weight”); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (requiring “specific and persuasive reasons” for crediting a causation opinion where the physician erroneously fails to diagnose pneumoconiosis); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 34-36. We therefore affirm the ALJ’s finding that Employer failed to establish no part of Claimant’s respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge