

U.S. Department of Labor

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



BRB No. 24-0188 BLA

SANDRA PRIVETT
(o/b/o GARLAND C. PRIVETT)

Claimant-Respondent

v.

U.S. STEEL MINING COMPANY
ALABAMA, LLC

Employer-Petitioner

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 07/09/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris,
Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and
Order Awarding Benefits (2021-BLA-05914) rendered on a claim filed on September 1,

2020,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of twenty years of qualifying coal mine employment and found the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant² invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).³ The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's findings that Claimant established total disability, and thereby invoked the Section 411(c)(4) presumption, and that it failed to rebut the presumption.⁴ Neither Claimant nor the Acting Director, Office of Workers' Compensation Programs, filed a response.

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

¹ The ALJ indicated the Miner filed his claim for benefits on May 29, 2020. Decision and Order at 2. However, although the claim for benefits form (CM-911) was signed by the Miner on May 29, 2020, the claim was not filed until September 1, 2020. Director's Exhibits 2, 49; *see also* Decision and Order at 21 (indicating benefits payable from September 2020, the month and year in which the Miner filed his claim).

² Claimant is the widow of the Miner, who died on December 30, 2020, while his claim was pending before the district director. Hearing Transcript at 24. She is pursuing the miner's claim on behalf of her husband's estate. Director's Exhibit 39.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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.

⁴ We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

accordance with applicable law.⁵ 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).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying 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 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 pulmonary function study evidence, the arterial blood gas study evidence, and the evidence as a whole.⁷ Decision and Order at 5-12.

Pulmonary Function Study and Arterial Blood Gas Study Evidence

The ALJ considered the pulmonary function study and blood gas study conducted as part of Dr. Forehand’s October 14, 2020 Department of Labor (DOL)-sponsored complete pulmonary evaluation of the Miner.⁸ Decision and Order at 6-8; Director’s

⁵ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 3.

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).

⁷ The ALJ found there is no evidence of cor pulmonale with right-sided congestive heart failure and that the medical opinions do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iii), (iv); Decision and Order at 6 n.5, 8-11.

⁸ Dr. Gaziano indicated the October 14, 2020 pulmonary function and blood gas studies are valid. Director’s Exhibit 14 at 1.

Exhibit 11. The pulmonary function study had qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 11 at 9-16. The blood gas study had qualifying values at rest and an exercise test was not administered.⁹ *Id.* at 7-8.

The ALJ found the qualifying pulmonary function study values valid and support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 7. She similarly determined that the qualifying blood gas study values support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.* at 8.

Employer argues that the ALJ erred in not considering Dr. Basheda's deposition testimony concerning the reliability of the October 14, 2020 pulmonary function and blood gas studies.¹⁰ Employer's Brief at 8-9. It further asserts the ALJ failed to consider whether an acute illness affected the objective testing. *Id.* Arguing the ALJ failed to consider relevant evidence, Employer contends the case must be remanded. *Id.* at 9. We disagree.

In his initial July 28, 2021 report, Dr. Basheda noted that the October 14, 2020 pulmonary function and blood gas studies are qualifying based on DOL guidelines and that the Miner would be unable to perform his last coal mine work or work of similar effort. Employer's Exhibit 4 at 15-17. He indicated "[a] comment must be made about assessing impairment at this time" because the Miner was not then on any respiratory medications but should have been, based on "his clinical history and pulmonary function testing findings." *Id.* at 15. Dr. Basheda recommended performing pulmonary function studies again after proper treatment with medication and "an appropriate clinical trial." *Id.* at 15-16. In his June 15, 2022 supplemental report, Dr. Basheda reiterated the findings from his previous report, clarifying that with "the limited objective data, it is not possible to classify [the Miner's] obstructive lung disease as fixed, reversible, or partially reversible." Employer's Exhibit 6 at 4-6.

At his August 25, 2022 deposition, Dr. Basheda testified that the Miner had "very severe cardiovascular disease," "the worst stage of kidney failure," diastolic dysfunction,

⁹ Dr. Forehand indicated the exercise portion of the study was medically contraindicated because the Miner was in a wheelchair. Director's Exhibit 11 at 7.

¹⁰ The ALJ stated, "Dr. Basheda was deposed on August 25, 2022. Nothing in his deposition testimony materially relates to his finding of total disability. Therefore, I decline to summarize it here." Decision and Order at 9 n.10. However, as Employer asserts, in its closing brief before the ALJ, it specifically cited to relevant portions of Dr. Basheda's deposition where he discussed the reliability of the October 2020 objective studies and whether the Miner was suffering from an acute or chronic disease. Employer's Brief at 8-9; *see* Employer's Brief Before the ALJ at 4-5.

and “evidence of peripheral vascular occlusive disease with previous stroke.” Employer’s Exhibit 7 at 7-8. He indicated the Miner had a thoracentesis to remove fluid around his lungs on September 23, 2020, and again about two weeks after Dr. Forehand’s October 14, 2020 examination. *Id.* at 14. In response to a question asking whether these procedures before and after the October 2020 examination affected the validity of the pulmonary function study, Dr. Basheda replied:

When you look at validity of pulmonary function testing, you look at acceptable reproducibility. There was acceptable reproducibility with the pre and post bronchodilator FEV1 and FVC. He had an acceptable forced expiratory time of 11 to 12 seconds. I believe the effort was valid. There are some factors outside of the lungs that can affect the FEV1 and FVC measurements [B]ased on the instability of his cardiovascular disease and recurrent pleural effusions, they were certainly a factor in reducing both his FEV1 and FVC measurements[.]

Id. at 14-15. Dr. Basheda then stated that in an “ideal situation,” a pulmonary function study would have been performed after it was confirmed that there were “no other factors that could affect [the Miner’s] ability to perform a pulmonary function test.” *Id.* at 16. When asked if the Miner was “acutely ill with other conditions,” Dr. Basheda responded the Miner was “[a]cute and chronically ill. I mean, his cardiovascular disease was a chronic problem. You get acute exacerbations of that disease.” *Id.* In addition, in response to a question concerning the reliability of the pulmonary function study in assessing legal pneumoconiosis, Dr. Basheda stated “there are a number of nonpulmonary factors that are affecting [the Miner’s] pulmonary function tests. To say that there is any impairment in an unstable medical condition and in the absence of therapy for tobacco-induced obstructive lung disease, I can’t say the [pulmonary function studies] were reliable.” *Id.* at 23.

Concerning the October 14, 2020 blood gas study, Dr. Basheda opined the abnormalities indicated by it were caused by the Miner’s diuretic therapy. Employer’s Exhibit 7 at 19-20. Dr. Basheda also noted that the Miner’s oxygen saturation was eighty-five percent on October 14, 2020, but a week later was ninety-four to ninety-five percent and this increase “quite possibly” could have caused a change in the blood gas study values. *Id.* at 21. He explained that as the PO₂ level goes up, the carbon dioxide level goes down and that “[t]he respiratory status can change quickly in people with congestive heart failure.” *Id.*

Appendix B to 20 C.F.R. Part 718 governs the administration of pulmonary function studies and states that “tests must not be performed during or soon after an acute respiratory illness.” Similarly, Appendix C to 20 C.F.R. Part 718 provides that arterial blood gas

studies “must not be performed during or soon after an acute respiratory or cardiac illness.” As evident by the summary of Dr. Basheda’s testimony, however, he did not opine that the Miner suffered from an acute respiratory or cardiac illness, but rather from symptoms or acute exacerbations of a chronic disease or nonpulmonary condition. Although Dr. Basheda indicated the studies were not performed in medically ideal conditions,¹¹ he confirmed that they are both valid and qualifying under DOL guidelines. *See* Employer’s Exhibit 7 at 14-16. Further, the relevant inquiry at 20 C.F.R. §718.204(b) is whether the miner had a totally disabling respiratory or pulmonary impairment; the underlying etiology 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. *See Island Creek Coal Co. v. Blankenship*, 123 F.4th 684, 692 (4th Cir. 2024); *Bosco v. Twin Pines Coal Co.*, 892 F.3d 1473, 1480-81 (10th Cir. 1989). DOL regulations specifically recognize respiratory and pulmonary impairments which may have nonrespiratory causes in determining the existence of total disability. 20 C.F.R. §718.204(a).

Consequently, error in the ALJ’s failure to consider Dr. Basheda’s deposition testimony in evaluating the October 13, 2020 pulmonary function and blood gas studies is harmless. *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”); *see also Blankenship*, 123 F.4th at 696-97; *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we affirm the ALJ’s finding that Claimant established the pulmonary function study and blood gas study evidence support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 6-8.

Medical Opinion Evidence

Before weighing the medical opinions, the ALJ addressed the exertional requirements of the Miner’s usual coal mine work as a heavy equipment operator. Decision and Order at 4-5. Relying on Claimant’s testimony and Form 913, Description of Coal Mine Work, she found the Miner’s usual coal mine work required moderate labor. Decision and Order at 4-5; Director’s Exhibit 4; Hearing Transcript at 26. As this finding is unchallenged, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

¹¹ We note that the proper inquiry regarding whether the Miner was totally disabled is whether he was able to perform his usual coal mine work and not whether he was able to perform that work with the use of medication or other treatment. 20 C.F.R. §718.204(b)(2); *see* 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 . . .”).

The ALJ then considered the medical opinions of Drs. Forehand, Goodman, and Basheda, all of whom opined that the Miner was totally disabled. Decision and Order at 8-11; Director's Exhibit 11; Employer's Exhibits 1, 4-7. The ALJ determined all three medical opinions to have equal weight with respect to the physicians' credentials. Decision and Order at 10. But the ALJ gave little weight to all three opinions, as she determined that none of the physicians had an adequate understanding of the exertional requirements of the Miner's usual coal mine employment. Decision and Order at 10-11.

Employer argues the ALJ erred in giving equal weight to Dr. Forehand's credentials and failing to consider "all relevant evidence" concerning Dr. Basheda's credentials. Employer's Brief at 5-7. It also argues the ALJ erred in finding Drs. Basheda and Goodman had an inadequate understanding of the exertional requirements of the Miner's coal mine work as a means of discrediting the physicians. Employer's Brief at 7-8. It is not necessary to address Employer's arguments.

Employer acknowledges that "the experts explained there was acute and chronic impairment that would prohibit coal mine work" and states that the physicians "assess[ed] an impairment regardless of the quantum of work being done."¹² Employer's Brief at 7-8. Thus, even assuming, *arguendo*, the ALJ erred in her weighing of the medical opinion evidence, Employer has failed to demonstrate how any error would have made a difference, as no physician of record opined that Miner was not totally disabled. *See Shinseki*, 556 U.S. at 413; Decision and Order at 8-11. As we have affirmed the ALJ's findings that the pulmonary function study and blood gas study evidence support a finding of total disability and there is no contrary probative evidence, we affirm the ALJ's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 11-12. We thus affirm her finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 12.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,¹³ or "no

¹² Employer generally states "their assessments do not prove pulmonary disability from a permanent impairment of lung function caused by a chronic lung disease." Employer's Brief at 7-8. To the extent this argument is adequately briefed, it appears to be in regard to the cause of the Miner's respiratory impairment, which is not the proper inquiry at 20 C.F.R. §718.204(b)(2)(iv).

¹³ "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

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 failed to establish rebuttal by either method.¹⁴ Decision and Order at 13-21.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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 the opinions of Drs. Basheda and Goodman to disprove legal pneumoconiosis. The ALJ found Dr. Basheda indicated that legal pneumoconiosis could not be excluded “but did not otherwise opine on the etiology of the Miner’s respiratory impairment.” Decision and Order at 18. Concerning Dr. Goodman, the ALJ found his opinion that the Miner did not have legal pneumoconiosis is not well-reasoned and therefore entitled to little weight.¹⁵ *Id.* at 19.

Employer generally states that Drs. Basheda’s and Goodman’s opinions are “better supported by all the data, and consistent with the clinical picture,” and asserts that even if the presumption is invoked, “the evidence shows that any disability was not due to a chronic coal mine dust induced lung disease as impairment was not permanent and varied

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).

¹⁴ The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 13-18.

¹⁵ The ALJ also considered the Miner’s treatment records but determined nothing in the records show that the Miner did not have legal pneumoconiosis, and therefore they do not support Employer’s burden on rebuttal. Decision and Order at 19. As Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711.

week to week.”¹⁶ Employer’s Brief at 14-15. As Employer does not explain how Drs. Basheda’s and Goodman’s opinions are better supported by the record or what evidence shows that the Miner did not have legal pneumoconiosis, we decline to address its arguments as inadequately briefed. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-199, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Consequently, we affirm the ALJ’s finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer’s failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next addressed whether Employer established “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). The ALJ discredited Dr. Goodman’s opinion concerning total disability causation because he failed to diagnose legal pneumoconiosis, contrary to the ALJ’s finding that Employer failed to disprove the Miner had the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 19-20. Employer does not specifically challenge the ALJ’s finding, aside from its general assertion cited above that the evidence supports rebuttal.¹⁷ *See* Employer’s Brief at 15. We therefore affirm the ALJ’s determination that Employer failed to establish that no part of the Miner’s respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711.

¹⁶ The ALJ also considered Dr. Forehand’s opinion, noting that he diagnosed the Miner with legal pneumoconiosis. Decision and Order at 18; Director’s Exhibit 11; Employer’s Exhibit 1. However, because Dr. Forehand’s opinion does not aid Employer in rebutting the presumption, we need not address Employer’s arguments concerning his opinion. Employer’s Brief at 9-15.

¹⁷ Employer states that Drs. Goodman and Basheda agreed that the Miner’s death was related to his cardiovascular and valvular diseases, recurrent pleural effusions, hypertension, or stage four chronic kidney disease but not due to clinical or legal pneumoconiosis. Employer’s Brief at 13. However, the proper inquiry in a miner’s claim is the cause of the individual’s totally disabling respiratory impairment, not death causation. *See* 20 C.F.R. §§718.204(c), 718.305(d)(1).

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

MELISSA LIN JONES
Administrative Appeals Judge