

U.S. Department of Labor

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



BRB No. 25-0004 BLA

JOHN E. MASSEY, JR.

Claimant-Respondent

v.

LIGHTNING CONTRACT SERVICE,
INCORPORATED

and

GRANITE STATE INSURANCE/
AMERICAN INSURANCE GROUP (AIG)

Employer/Carrier-
Petitioners

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 07/15/2026

DECISION and ORDER

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

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Austin), Norton,
Virginia, for Claimant.

Daniel G. Murdock (Fulton, Devlin & Powers, LLC), Lexington, Kentucky,
for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits and Granting Request for Modification (2022-BLA-05630) rendered on a request for modification of a subsequent claim¹ filed on March 25, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act).

In an August 30, 2021 Decision and Order Denying Benefits, the ALJ credited Claimant with twenty-four years of coal mine employment, based on the parties' stipulation, and found Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304 or a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Thus, she determined Claimant did not establish a change in an applicable condition of entitlement,² 20 C.F.R. §725.309(c), and denied benefits.

Claimant timely requested modification. *See* 20 C.F.R. §725.310(a) (authorizing the reopening of a claim based on a mistake of fact or a change in conditions). In her August 30, 2024 Decision and Order Awarding Benefits and Granting Request for Modification, the subject of the current appeal, the ALJ found Claimant established a totally disabling respiratory or pulmonary impairment based on newly submitted evidence. 20 C.F.R. §718.204(b)(2). She therefore determined Claimant established both a change in conditions under 20 C.F.R. §725.310 and a change in an applicable condition of

¹ Claimant filed two prior claims. He withdrew his first claim, and it is therefore considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 1. He filed his second claim on March 30, 2017, which the district director denied on February 14, 2018, because Claimant failed to establish he was totally disabled. Director's Exhibit 2 (Prior Denied Claim Director's Exhibit 19 at 6). Claimant took no further action until filing his current claim.

² When a miner 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); *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 Claimant failed to establish total disability in his prior claim, he had to submit new evidence establishing that element of entitlement to obtain review of the merits of his current claim. *Id.*

entitlement, 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.³ 30 U.S.C. §921(c)(4). The ALJ also determined Employer failed to rebut the presumption, and that granting Claimant's request for modification renders justice under the Act. She therefore awarded benefits.

On appeal, Employer does not argue the ALJ wrongly invoked the Section 411(c)(4) presumption and argues instead only that she erred in finding Employer did not rebut it.⁴ Claimant responds in support of the award of benefits. The Director, Officer of Workers' Compensation Programs, has not filed a substantive 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 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 (1965).

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,⁶ or that "no part of

³ 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); 20 C.F.R. §718.305.

⁴ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, thereby invoking the Section 411(c)(4) presumption and establishing a change in conditions and a change in an applicable condition of entitlement at 20 C.F.R. §§725.309(c), 725.310(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 15, 23.

⁵ 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 5; Hearing Transcript at 18.

⁶ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition 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

[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); *Wolf Run Mining Co. v. Director, OWCP* [Baisden], 172 F.4th 304, 308 (4th Cir. 2026); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method.⁷ Decision and Order at 21, 23-24.

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); *W. Va. CWP Fund v. Director, OWCP* [Smith], 880 F.3d 691, 695 (4th Cir. 2018); *Minich*, 25 BLR at 1-155 n.8.

Employer relies on Drs. Zaldivar’s and Rosenberg’s medical opinions that Claimant does not have legal pneumoconiosis⁸ to rebut the presumption.⁹ Decision and Order at 19-21; Director’s Exhibits 68, 76, 78; Employer’s Exhibit 1. The ALJ found both physicians’ opinions unpersuasive and therefore insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 21.

diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1).

⁷ The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 17.

⁸ Dr. Rosenberg acknowledged that Claimant could have a “minimal degree” of legal pneumoconiosis given his residual impairment but overall testified that the evidence does not support a finding of legal pneumoconiosis. Director’s Exhibit 68 at 175 (Employer’s Exhibit 6 at 14).

⁹ The ALJ correctly observed that Dr. Werchowski diagnosed Claimant with legal pneumoconiosis. Decision and Order at 19; Director’s Exhibits 15 at 8; 23 at 2. Because Dr. Werchowski’s opinion does not aid Employer in rebutting the Section 411(c)(4) presumption, we need not address Employer’s arguments that the ALJ erred in crediting Dr. Werchowski’s opinion regarding legal pneumoconiosis. *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”); Employer’s Brief at 4-7.

Employer asserts the ALJ erred in discrediting Drs. Zaldivar's and Rosenberg's opinions as contrary to the preamble to the 2001 revised regulations' recognition that asthma can constitute legal pneumoconiosis. Employer's Brief at 5-7. It further generally contends that their opinions are well-reasoned and reliable and therefore sufficient to rebut the presumption. *Id.* at 4, 7. We disagree.

Dr. Zaldivar initially diagnosed asthma caused by smoking because he opined that the variability he observed in Claimant's obstructive impairment is not consistent with legal pneumoconiosis as impairments caused by asthma are fixed. Director's Exhibit 68 at 23-25, 28-29 (Employer's Exhibit 4¹⁰ at 21-23, 26-27), 133-34 (Employer's Exhibit 3 at 2-3). In his most recent report, he noted Claimant's smoking history is "fairly brief and not significant" and indicated Claimant's asthma is not due to smoking. Employer's Exhibit 1 at 5. But he explained that neither silica nor coal cause asthma because they are not allergenic and Claimant does not have occupational asthma because "[t]here is no evidence of any occupational exposure to [a] substance other than the dust itself." Employer's Exhibit 1 at 4-5; *see also* Director's Exhibit 68 at 40-43 (Employer's Exhibit 4 at 38-41), 134 (Employer's Exhibit 3 at 3). Dr. Rosenberg observed Claimant has "variable airflow obstruction without restriction" and diagnosed asthmatic or hyperreactive airways disorder unrelated to coal dust exposure. Director's Exhibit 76 at 4. Further, Dr. Rosenberg testified that coal dust causes a fixed impairment and therefore would not cause the variability and response to bronchodilators on pulmonary function testing that he observed in Claimant. Director's Exhibit 68 at 173 (Employer's Exhibit 6 at 12). He also indicated Claimant's respiratory impairment is not due to coal dust because coal dust does not cause asthma. *Id.*

Contrary to Employer's contention, the ALJ permissibly found their opinions inconsistent with the medical science set forth in the preamble to the 2001 revised regulations, which states asthma can be aggravated by coal dust exposure and thus constitute legal pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,939, 79,943 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16 (4th Cir. 2012) (ALJ may discredit a physician's opinion if it is inconsistent with the preamble); *see also Am. Energy, LLC v. Director, OWCP [Goode]*, 106 F.4th 319, 332 (4th Cir. 2024); *Helen Mining Co. v. Elliott*, 859 F.3d 226, 239-40 (3d Cir. 2017); Decision and Order at 20-21; Employer's Brief at 5-7. In addition, the ALJ permissibly determined that neither physician adequately explained why Claimant's significant history of coal dust exposure was not a factor in his totally disabling respiratory impairment, especially given that Drs. Zaldivar and Rosenberg acknowledged that Claimant has some residual, fixed impairment. *See Looney*, 678 F.3d at 313-14 (ALJ may accord less weight to a physician who fails to

¹⁰ The exhibit numbers in parentheses refer to how these exhibits are referenced in the ALJ's August 30, 2021 Decision and Order Denying Benefits. Director's Exhibit 79.

adequately explain why a miner's chronic lung disease "was not due at least in part to his coal dust exposure"); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 21.

Because the ALJ acted within her discretion in rejecting the opinions of Drs. Zaldivar and Rosenberg, we affirm her finding that Employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 23. 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 [Claimant's] disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). She discredited the disability causation opinion of Dr. Zaldivar because he failed to diagnose legal pneumoconiosis, contrary to her finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 22. The ALJ again noted Dr. Rosenberg's opinion that legal pneumoconiosis could be a minor factor in Claimant's respiratory impairment and discredited his opinion for the same reasons she discredited it when considering whether Employer disproved legal pneumoconiosis. *See Looney*, 678 F.3d at 316-17; *Epling*, 783 F.3d at 504-05.

Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we have rejected. Employer's Brief at 5-7. Thus, we affirm the ALJ's finding that Employer failed to rebut the presumption under 20 C.F.R. §718.305(d)(1)(ii). We further affirm, as unchallenged, the ALJ's determination that granting modification would render justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Granting Request for Modification.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge