U.S. Department of Labor

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

BRB No. 24-0311 BLA

CHARLES F. SLAUGHTER, SR. Claimant-Petitioner v. SOUTHERN OHIO COAL COMPANY and CONSOL ENERGY, INCORPORATED c/o EAST COAST RISK MANAGEMENT LLC Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 06/16/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

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

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2023-BLA-05421) rendered on a subsequent claim[1] filed on August 19, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least twenty-two years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309(c), and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Further finding Employer rebutted the presumption by establishing Claimant does not have pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding Employer and its Carrier (Employer) rebutted the Section 411(c)(4) presumption. Employer responds in support of

[1] This is Claimant's fifth claim for benefits. He filed his most recent prior claim on December 8, 2017, but then withdrew it. Director's Exhibit 5. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. Claimant filed his fourth claim on July 30, 2002, which the district director denied on August 20, 2003, because Claimant failed to establish any element of entitlement. Director's Exhibit 4 at 6.

[2] Where 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 any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[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) (2018); *see* 20 C.F.R. §718.305.

the denial of benefits. The Acting Director, Office of Workers' Compensation Programs, has not 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 accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (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[5], or that "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 established rebuttal by disproving the existence of both clinical and legal pneumoconiosis. Decision and Order at 23-24. Claimant challenges the ALJ's finding that Employer disproved legal pneumoconiosis.[6] Claimant's Brief at 5-7.

To disprove legal pneumoconiosis, Employer must prove Claimant does not have a chronic lung disease or impairment that is "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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant 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 8; Hearing Tr. at 38.

[5] 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). This definition encompasses 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).

[6] We affirm as unchallenged on appeal the ALJ's finding that Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22-24.

n.8 (2015). The ALJ considered the medical opinions of Drs. Go, Basheda, Allen, and Jaworski. All physicians diagnosed a restrictive impairment; however, they disagree as to its cause.[7] Dr. Go opined Claimant has legal pneumoconiosis, in the form of "chronic lung disease" due, in part, to coal dust exposure, and that this disease contributes to his restriction. Claimant's Exhibit 2 at 5-6.

By contrast, Drs. Basheda, Allen, and Jaworski did not diagnose legal pneumoconiosis. Director's Exhibit 17; Employer's Exhibits 1, 1a, 3. Dr. Basheda opined Claimant has no evidence of chronic pulmonary disease and attributed the entirety of his restrictive impairment to non-pulmonary causes including obesity, marginal forced expiratory time on pulmonary function testing, significant spinal disease that reduces chest expansion, and left pleural thickening possibly related to previous cardiac surgery. Employer's Exhibit 1 at 15-17. Dr. Allen attributed Claimant's restriction to pleural plaques, for which she explained asbestos exposure is the most common cause. Director's Exhibit 17 at 5. Dr. Jaworski stated Claimant's restriction is "likely" due to morbid obesity and air trapping due to reactive airway disease caused by "personal predisposition." Employer's Exhibit 3 at 4.

The ALJ found Dr. Go's opinion does not aid Employer in disproving legal pneumoconiosis and did not further consider his opinion. Decision and Order at 22. She found Dr. Basheda's opinion probative and entitled to significant weight as he provided multiple causal factors based on observation, medical history, and examination and provided a thorough explanation excluding coal mine dust exposure as a cause of his impairment. *Id.* at 23. The ALJ found Dr. Jaworski's opinion "somewhat equivocal" as he "provided various potential causes" of Claimant's restriction and therefore found it entitled to "less weight." Decision and Order at 23. Further finding Dr. Allen's opinion adequately documented and consistent with Dr. Basheda's opinion, she found Dr. Allen's opinion "entitled to weight." *Id.* The ALJ concluded the medical opinion evidence "does not support a finding of . . . legal pneumoconiosis" and Employer therefore successfully rebutted the Section 411(c)(4) presumption. *Id.* at 23-24.

Claimant contends the ALJ erred in finding Dr. Basheda's opinion well-reasoned. Claimant's Brief at 7; Claimant's Closing Brief at 7. We agree.

Because Claimant invoked the Section 411(c)(4) presumption, he is presumed to have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, it is Employer's burden to affirmatively demonstrate by a preponderance of the evidence that Claimant's totally disabling respiratory or pulmonary impairment is "not significantly related to, or

[7] None of the physicians diagnosed either an obstructive or gas exchange impairment.

aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.305(d)(1)(i)(A); 718.201(a)(2), (b); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255 (2019). As Claimant argues, although the ALJ found Dr. Basheda supported his conclusion that Claimant's pulmonary impairment is due to non-pulmonary causes, she erred by not considering whether Dr. Basheda's opinion sufficiently addressed whether coal mine dust was a contributing or aggravating factor. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); *Hawkinberry*, 25 BLR at 1-255; Claimant's Brief at 5-6; Claimant's Closing Brief at 7. Thus, we vacate the ALJ's finding that Dr. Basheda's opinion is well-reasoned and sufficient to support Employer's burden to disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 23; *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Further, to the extent the ALJ credited Dr. Allen's opinion because it is consistent with Dr. Basheda's opinion, we also vacate that finding.[8]

[8] Although our dissenting colleague notes the Board should not craft and consider an argument that has not been presented by Claimant, Claimant specifically contended on appeal that where a medical opinion ignores the possibility that coal dust may have, in addition to other causes, played a significant role in a claimant's impairment, such a medical opinion is properly discredited and cannot support the Employer's burden of proving the absence of legal pneumoconiosis. Claimant's Brief at 6 (citing *Brandywine Explosives & Supply v. Dir., OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015)). And while our colleague points to the various alleged causes the ALJ noted that Dr. Basheda argued combine to produce Claimant's impairment, nowhere did the ALJ explain *how* Dr. Basheda completely and *affirmatively excluded* Claimant's twenty-two years of underground coal dust exposure as another cause (more than contending that coal dust played an insignificant role in the impairment, Dr. Basheda eliminated it entirely). Thus, although the ALJ baldly states "Dr. Basheda provided a thorough explanation excluding coal dust exposure," Decision and Order at 23, that affirmative explanation is simply absent from the ALJ's decision and our colleague's dissent -- and without it Employer cannot meet its burden. *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018). Moreover, if the ALJ discredits Dr. Basheda's opinion, she need not weigh it against Dr. Go's opinion because Dr. Go's opinion cannot help Employer meet its burden. But if she finds Dr. Basheda credible, contrary to our colleague's position, she then must weigh the persuasiveness of Dr. Basheda's opinion versus Dr. Go's opinion.

We also agree with Claimant that Dr. Go's opinion is relevant to the legal pneumoconiosis inquiry and the ALJ thus erred in failing to fully consider it as the Administrative Procedure Act (APA)[9] requires. Claimant's Brief at 6-7; *see Addison*, 831 F.3d at 252-53; *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.204(b)(2)(iv). The opinions of Drs. Go and Basheda directly conflict as to whether Claimant has legal pneumoconiosis.[10] Claimant's Exhibit 2 at 5; Employer's Exhibit 1a at 2. Thus, even assuming Dr. Basheda's opinion is credible, the ALJ was required to address the credibility of Dr. Go's opinion and explain how she resolved the conflict in medical opinion evidence, which she failed to do. *Minich*, 25 BLR at 1-159 (to rebut the presumed existence of pneumoconiosis, an employer must show by a preponderance of the evidence that the miner did not have a chronic lung disease or impairment that was significantly related to, or substantially aggravated by, dust exposure in coal mine employment); *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

We thus vacate the ALJ's finding that Employer disproved legal pneumoconiosis and the denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider whether Employer has rebutted the presumption of legal pneumoconiosis. In doing so, she must consider Claimant's argument that Dr. Go's legal pneumoconiosis diagnosis is credible. *See McCune*, 6 BLR at 1-998; Claimant's Brief at 6-7. She must further consider whether Dr. Basheda persuasively and affirmatively supported his conclusion that coal dust played no role in Claimant's impairment. 20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR 1-155

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[10] Dr. Go opined Claimant's July 29, 2021 lung volume measurement evidences air trapping consistent with obstructive lung disease which he further opined contributes to Claimant's restriction. Claimant's Exhibit 2 at 5. By contrast, Dr. Basheda opined there is no evidence that Claimant has a chronic lung disease. He explained air trapping can be associated with obstructive lung disease; however, Claimant's lung volume measurement does not meet diagnostic criteria for air trapping and none of the FEV1/FVC values on his pulmonary function tests indicate an obstructive impairment. Employer's Exhibits 1 at 14; 1a at 2.

n.8. In weighing the medical opinion evidence, the ALJ should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42 (4th Cir. 1997). The ALJ must set forth her findings in detail as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

If the ALJ again finds Employer disproved the existence of legal pneumoconiosis, Employer will have rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(i) and the ALJ need not reach the issue of disability causation. However, if Employer fails to establish Claimant does not have legal pneumoconiosis, the ALJ must then determine whether Employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible evidence that "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-159. If Employer is unable to rebut the Section 411(c)(4) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii), Claimant will have established entitlement to benefits.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand the case for further consideration as to whether Employer established Claimant does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). Claimant contends the ALJ erred in crediting Dr. Basheda's opinion that Claimant does not have legal pneumoconiosis without also addressing the credibility of Dr. Go's contrary opinion. However, because Dr. Go's opinion is consistent with the presumed fact of legal pneumoconiosis and Claimant assigns

no specific error to the ALJ's finding Dr. Basheda's opinion credible as to rebuttal, I would affirm the ALJ's denial of benefits.[11]

A fundamental concept of our "adversarial system" is that a court must "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (Where "courts have approved departures from the party presentation principle, the justification has usually been to protect a pro se litigant's rights."). Pursuant to this principle, "courts generally do not craft new arguments for a party, especially in civil cases and especially when the party is represented by counsel." *Horne v. Elec. Eel Mfg. Co., Inc.*, 987 F.3d 704, 727 (7th Cir. 2021). "Courts are entitled to expect represented parties to incorporate all relevant arguments" in the pleadings that directly address a motion or appeal. *Dahua Tech. USA Inc. v. Feng Zhang*, 988 F.3d 531, 538 (1st Cir. 2021). Thus the Board should not craft and consider an argument that has not been presented by Claimant. *Greenlaw*, 554 U.S. at 243; *Feng Zhang*, 988 F.3d at 538; *Horne*, 87 F.3d at 727; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). Claimant must demonstrate with some degree of specificity the manner in which the ALJ's decision is unsupported by the facts or contrary to law. *Cox*, 791 F.2d at 446.

Claimant asserts that "the ALJ erred in crediting Dr. Basheda's opinion of no legal pneumoconiosis, offers conclusion [sic] analysis, and ignores Claimant's arguments made in closing as to why Dr. Basheda should be discredited on the existence of legal pneumoconiosis." Claimant's Brief at 7.

The ALJ accurately observed Dr. Basheda attributed the entirety of Claimant's restrictive impairment to nonpulmonary factors because he found no evidence of chronic pulmonary disease to define coal workers' pneumoconiosis. Decision and Order at 22-23; Employer's Exhibit 1 at 15-17. The ALJ explained her basis for finding Dr. Basheda's opinion credible, stating:

> [Dr. Basheda] explained that restriction can be due to pulmonary or nonpulmonary factors and opined that Claimant's abnormalities are due to nonpulmonary factors, including obesity with a BMI of 47.8, pleural

[11] Further, Claimant merely avers, without any supporting argument, that because the ALJ credited Dr. Go's opinion as to disability she should have credited his opinion as to legal pneumoconiosis. Thus, to the extent the ALJ may have erred in failing to address Dr. Go's opinion as to legal pneumoconiosis in detail, Claimant failed to show how considering Dr. Go's opinion would have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

> thickening possibly due to his cardiac surgery, degenerative spinal disease causing curvature that reduced chest expansion, and cardiac disease causing symptoms including shortness of breath. Dr. Basheda also noted that Claimant's ABG from November 2020 shows results typical of obesity because it showed an increase in oxygen with exercise. Here, Dr. Basheda provided multiple factors based on observation, medical history, and examination and provided a through explanation excluding coal mine dust exposure as a cause of his symptoms and PFS abnormalities. His opinion is therefore well reasoned and documented. Dr. Basheda's opinion is also supported by the regulations, which address nonpulmonary conditions that cause a pulmonary disability and state that such disease shall be considered when determining whether a miner is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(a). It is entitled to significant weight.

Decision and Order at 22-23. In challenging this finding, Claimant mischaracterizes the ALJ's analysis as "conclus[ory]" and merely asserts error in crediting Dr. Basheda's opinion despite Claimant's having asserted it should be discredited.[12] Claimant's Brief at 7. As Claimant has not set forth any argument to support his summary contentions, he has provided no basis for the Board's review of the ALJ's decision.

Therefore, I respectfully disagree with the majority's creation of arguments Claimant has not supplied and would affirm as unchallenged the ALJ's finding that Dr. Basheda's opinion is well reasoned. *Greenlaw*, 554 U.S. at 243; *Feng Zhang*, 988 F.3d at

[12] Claimant's closing brief argues Employer cannot establish an absence of legal pneumoconiosis because Dr. Go credibly diagnosed the disease and Dr. Basheda's contrary opinion must be discredited. Claimant's Closing Brief at 7. Specifically, regarding Dr. Basheda, Claimant argued:

> Dr. Basheda attempts to exclude coal dust as a cause or contributor to Claimant's disabling impairment and states that impairment here may be related to past cardiac disease or procedures or other non-pulmonary processes. Dr. Basheda fails to expressly state what he believes to be the cause of such impairment and fails to offer any explanation as to why coal mine dust is not also a contributor to such impairment. His opinion must be discredited as a result.

Id.

538; *Horne*, 87 F.3d at 727; *Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §802.211(b).

Consequently, I would affirm the denial of benefits.

JUDITH S. BOGGS
Administrative Appeals Judge