U.S. Department of Labor

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

BRB No. 24-0084 BLA

CURTIS D. McCOY Claimant-Respondent v. CUMBERLAND RIVER COAL COMPANY/ARCH COAL, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 05/28/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William P. Farley, Administrative Law Judge, United States Department of Labor.

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

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

Ann Marie Scarpino (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order Awarding Benefits (2020-BLA-05941) rendered on a claim filed on November 6, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with twenty-nine years of coal mine employment based on the parties' stipulation, which the ALJ determined constituted qualifying employment, and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer failed to rebut the presumption and thus awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[3] It further asserts the removal provisions applicable to the ALJ render his appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established total disability, thereby invoking the Section 411(c)(4) presumption.

[1] Claimant filed a prior claim on April 28, 2014, but withdrew it. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

> [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.

It further asserts the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's constitutional arguments. Employer filed a reply brief addressing Claimant's and the Director's arguments.[4]

The 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, 361-62 (1965).

Appointments Clause and Removal Protections

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).[6] Employer's Brief at 50-56; Employer's Reply Brief at 4-6. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-nine years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16; Director's Exhibit 3.

[6] *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 administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (citing *Freytag v. Comm'r*, 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.

[7] 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 Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or

was insufficient to cure the constitutional defect in the ALJ's employment. Employer's Brief at 51-53; Employer's Reply Brief at 4-6. 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 51-53, 56; Employer's Reply Brief at 4-5. 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). Employer's Brief at 53-54; Employer's Reply Brief at 4-5. 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.

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

To invoke the Section 411(c)(4) presumption, Claimant must also 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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[8] evidence of pneumoconiosis and

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> presided over by, administrative law judges of the [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Farley.

[8] 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.

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 studies, the medical opinion evidence, and the evidence as a whole.[9] Decision and Order at 14-21, 23-31.

Employer asserts the ALJ erred in finding the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).[10] Employer's Brief at 67-69.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine employment. He considered Claimant's Form CM-913 Description of Coal Mine work, deposition testimony, and hearing testimony and found Claimant's usual coal mine employment was working as a roof bolter and shuttle driver/operator. Decision and Order at 9-10. Claimant reported his usual coal mine work required that he lift and carry as much as forty pounds forty times per day. Director's Exhibits 4 at 2; 58 at 16. The ALJ thus found Claimant's usual coal mine employment required heavy exertional work. Decision and Order at 10 (citing *Dictionary of Occupational Titles* (4th Ed., Rev. 1991) (defining heavy work as "[e]xerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects")).

Employer argues the ALJ erred in finding Claimant's usual coal mining work required heavy exertion because he "focused on the hardest part of [Claimant's] work rather than his usual coal mine employment." Employer's Brief at 67-69. We disagree.

Initially, contrary to Employer's assertion, a task need not be performed every day for it to be considered part of a miner's duties for purposes of determining whether he can perform his usual coal mine employment. *See Eagle v. Armco Inc.*, 943 F.2d 509, 511-12

Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The ALJ found the arterial blood gas study evidence failed to establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 21-23.

[10] We affirm, as unchallenged on appeal, the ALJ's finding that the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack*, 6 BLR at 1-711; Decision and Order at 14-21.

& n.4 (4th Cir. 1991). 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 exertion. *See Heavilin v. Consolidation Coal Co*., 6 BLR 1-1209, 1-1213 (1984) ("It is for the [ALJ] to determine the nature of [the] claimant's usual coal mine employment."); 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).

The ALJ considered the medical opinions of Drs. Raj and Rosenberg, who opined Claimant is totally disabled, and Dr. Jarboe, who opined he is not. Decision and Order at 23-31; Director's Exhibits 16 at 5; 20 at 11; Claimant's Exhibits 1 at 8-9; 4 at 47-48; Employer's Exhibits 3 at 4; 11 at 52-54; 16 at 28. The ALJ gave Dr. Raj's opinion "normal weight," whereas he gave "less weight" to Dr. Rosenberg's opinion and "little weight" to Dr. Jarboe's opinion. Decision and Order at 30-31. Thus, weighing the opinions together, he found the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 31.

Employer contends the ALJ erred in discrediting Drs. Jarboe's and Rosenberg's opinions because he erroneously determined Claimant's usual coal mining work required heavy exertion. Employer's Brief at 67-69. Because we affirm the ALJ's finding that Claimant's usual coal mining work required heavy exertion, we reject Employer's contention. As Employer raises no further argument regarding the medical opinion evidence, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer also asserts the ALJ erred in finding the evidence as a whole establishes total disability because the ALJ failed to consider that Claimant's total disability could have causes such as Claimant's advanced age or non-respiratory conditions. Employer's Brief at 68-69. We reject this argument, as the DOL regulations specifically recognize respiratory and pulmonary impairments which may have non-respiratory causes in determining the existence of total disability. 20 C.F.R. §718.204(a). Employer conflates the issue of the presence of a total respiratory or pulmonary impairment with the cause of that impairment. 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); *Johnson*, 26 at 1-10-11. Further, we note that the tables used by the DOL in evaluating pulmonary function test results account for age, and no physician opined that Claimant's objective test results were not indicative of his respiratory or pulmonary condition because of his age. 20 C.F.R. Part 718, Appendix B.

As Employer raises no further arguments regarding the weighing of the totality of the evidence, we affirm the ALJ's finding that Claimant established total disability when considering the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 31. We thus affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 31, 33.

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,[11] 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 failed to establish rebuttal by either method.[12] Decision and Order at 31-46.

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).

[11] "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 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).

[12] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 33-35.

Employer relies on the opinions of Drs. Jarboe and Rosenberg to disprove legal pneumoconiosis, but the ALJ discredited both and gave them little weight. Decision and Order at 36-45. Employer asserts the ALJ erred in discrediting Drs. Jarboe's and Rosenberg's opinions.[13] Employer's Brief at 60-67. We disagree.

Dr. Jarboe diagnosed chronic asthmatic bronchitis caused by smoking cigarettes and unrelated to coal mine dust exposure. Director's Exhibit 20 at 8-10; Employer's Exhibit 16 at 31-32. He explained that objective testing shows Claimant has markedly elevated residual lung volume but studies show coal miners ordinarily experience lower degrees of elevation. Director's Exhibit 20 at 9. Dr. Jarboe also explained that smoking causes FEV1 on pulmonary function testing to decline at a faster rate than does coal mine dust exposure. *Id.* at 10. The ALJ permissibly discredited Dr. Jarboe's opinion because he did not adequately explain why Claimant's coal mine dust exposure did not substantially contribute to, or aggravate, his chronic asthmatic bronchitis. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *Stallard*, 876 F.3d at 673-74; Decision and Order at 43-44. Further, the ALJ permissibly discredited Dr. Jarboe's opinion because he cited no objective evidence to support his conclusions that Claimant's coal mine dust exposure did not cause his impairment but, rather, relied on statistics and literature for the premise that the loss in function was more likely the result of smoking. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (ALJ may find medical opinion unpersuasive if based on statistical generalities rather than specifics of the claimant's case); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Dr. Rosenberg diagnosed "asthma with superimposed adverse effects of smoking," unrelated to coal mine dust exposure. Employer's Exhibits 3 at 6; 15 at 7-8, 18-24. He explained Claimant's symptoms began after he left coal mining and opined the passage of time between leaving the mines and developing symptoms shows Claimant's impairment is unrelated to coal mine dust exposure. Employer's Exhibit 3 at 5-6. The ALJ permissibly

[13] Employer also asserts remand is required because the ALJ erred in evaluating Claimant's smoking history. Employer's Brief at 58-61. However, the ALJ did not use the length of Claimant's smoking history to credit or discredit any of the physicians' opinions. Rather, the ALJ determined that all the physicians had a fairly accurate understanding of Claimant's smoking history, as the ALJ found Claimant to have a seventeen pack-year history and the physicians recorded smoking histories that ranged from twelve pack-years to twenty-five pack-years. Decision and Order at 43. As such, any error in assessing the length of Claimant's smoking history 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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 43.

discredited this rationale as contrary to the regulations which recognize that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *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 latent and progressive may be discredited); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); Decision and Order at 44. The ALJ further permissibly discredited Dr. Rosenberg's opinion for relying on generalities rather than on Claimant's condition. *See Cochran*, 718 F.3d at 324; Decision and Order at 44.

Employer's arguments amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited Drs. Jarboe's and Rosenberg's opinions,[14] the only opinions supportive of Employer's burden,[15] we affirm his determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of [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 46-47. The ALJ rationally discredited Drs. Jarboe's and Rosenberg's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the disease. *See Epling*, 783 F.3d at 504-05 (where a physician erroneously fails to diagnose pneumoconiosis, his opinion as to disability causation "is not worthy of much, if any, weight"); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir.

[14] Because the ALJ provided valid reasons for discrediting Drs. Jarboe's and Rosenberg's opinions that Claimant does not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure, we need not consider Employer's remaining arguments concerning the ALJ's weighing of the doctors' opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 60-67.

[15] The ALJ also considered Dr. Raj's opinion that Claimant has legal pneumoconiosis. Decision and Order at 37-39. Because Dr. Raj's opinion does not aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address Employer's arguments regarding the ALJ's weighing of the doctor's opinion. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 61-65.

1995) (physician's opinion on disability causation "may not be credited at all" absent "specific and persuasive reasons" for concluding it is independent of his or her mistaken belief the miner did not have pneumoconiosis); Decision and Order at 40-41.

As it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was due to 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