U.S. Department of Labor

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

BRB No. 25-0183 BLA

TINSLEY C. KEYES, JR. Claimant-Respondent v. CONSOL MINING COMPANY, LLC and CONSOL ENERGY, INCORPORATED c/o SMART CASUALTY CLAIMS Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 05/12/2026 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, 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 ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2021-BLA-05910) rendered on a claim filed on July 1, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act).

The ALJ found Claimant established more than fifteen years of underground coal mine employment and he had 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] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and that it did not rebut the presumption.[3] Claimant and the Director, Office of Workers' Compensation Programs, declined to 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.[4] 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, a claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A

[1] This is Claimant's second claim for benefits. Director's Exhibit 3. Claimant filed a prior claim on March 8, 2013, but later withdrew it. Director's Exhibit 1; *see* Decision and Order at 2. A withdrawn claim is considered not to have been filed. *See* 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); *see* 20 C.F.R. §718.305.

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

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Tr. at 29-30.

miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or 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,[5] 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 medical opinions and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13-18. Employer contends the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 5-12. We disagree.

The ALJ found Claimant's usual coal mine work required moderately heavy to very heavy labor,[7] and considered the opinions of Drs. Forehand, McSharry, and Fino. Decision and Order at 6, 12-21. Dr. Forehand opined Claimant has a disabling respiratory impairment that precludes his usual coal mine work, while Drs. McSharry and Fino opined Claimant is not totally disabled. Director's Exhibits 13 at 4; 26 at 2; 29 at 15-18; 30; Employer's Exhibits 2 at 12-13; 3 at 10-11, 22; 4 at 15. The ALJ found Dr. Forehand's opinion documented, reasoned, and persuasive because he considered the degree of Claimant's impairment in conjunction with the very heavy demands of his coal mine employment. Decision and Order at 12-14. By contrast, he found Drs. McSharry's and Fino's opinions less persuasive because they relied on non-qualifying test results and did not adequately address whether Claimant's demonstrated impairment prevents him from performing the heavy work of his last coal mine job. *Id.* at 15-21. The ALJ therefore found

[5] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values 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).

[6] The ALJ found that the pulmonary function and arterial blood gas studies do not support a finding of total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 6-11.

[7] We affirm this finding as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

Dr. Forehand's opinion more persuasive and concluded the medical opinion evidence establishes total disability. *Id*. at 20-21.

Employer argues the ALJ erred crediting Dr. Forehand's opinion because it was based, in part, on pulmonary function testing he incorrectly believed demonstrated qualifying values, and that the ALJ failed to adequately account for this error. Employer's Brief at 5-9.

Contrary to Employer's argument, the ALJ expressly acknowledged Dr. Forehand mistakenly believed the July 28, 2020 pulmonary function study produced qualifying values and explained why that error did not undermine the credibility of his opinion. Decision and Order at 12 n.12. The ALJ found Dr. Forehand's opinion did not rely on whether the July 28, 2020 testing was qualifying, but rather on the degree of ventilatory impairment reflected in Claimant's test results and its effect on his ability to perform the exertional requirements of his usual coal mine work. *Id.* at 14, 21. In this regard, the ALJ found Dr. Forehand credibly opined Claimant's July 9, 2020 non-qualifying pulmonary function study yielded similar results to the July 28, 2020 study and its FEV1 values, within the low sixtieth percentile, reflect a mild impairment that precludes Claimant from performing the heavy rigors of his last coal mine work.[8] Decision and Order at 14, 21; Director's Exhibit 29 at 10-17. The ALJ further credited Dr. Forehand's explanation that Claimant's ability to perform limited exercise testing is not indicative of his capacity to perform prolonged or arduous labor. Decision and Order at 13-14, 21; Director's Exhibits 13 at 2; 29 at 17-18. Thus, although the ALJ recognized Dr. Forehand incorrectly believed the July 28, 2020 pulmonary function study was qualifying, the ALJ permissibly concluded his disability diagnosis remained credible because it adequately addressed the critical inquiry – whether Claimant's mild respiratory impairment precludes his ability to perform his usual coal mine work. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); 20 C.F.R. §718.204(b)(1)(i), (b)(2)(iv); Decision and Order at 14, 21. We therefore affirm the ALJ's credibility determination. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

[8] Dr. Forehand delineated the strenuous duties of Claimant's last coal mine job, which involved "moving, positioning, and operating mobile equipment, shoveling coal onto the belt, hanging power cables, lifting and moving water lines, setting timbers, and spreading 50-pound bags of rock dust in cold, dusty conditions." Director's Exhibits 30 at 2; 29 at 15-17.

Employer next argues the ALJ erred in crediting Dr. Forehand's opinion as more persuasive than the opinions of Drs. McSharry and Fino that Claimant's mild impairment is not totally disabling. Employer's Brief at 9-12. We find no error in the ALJ's weighing of these opinions. Contrary to Employer's argument, the ALJ permissibly found the opinions of Drs. McSharry and Fino less persuasive because both doctors focused primarily on whether the objective studies satisfied the regulatory disability standards and did not discuss whether Claimant could perform the specific exertional requirements of his usual coal mine work despite his mild impairment. *See Morrison*, 644 F.3d at 478; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 15-21; Director's Exhibit 26 at 2; Employer's Exhibits 2 at 7-13, 3 at 10, 4 at 12-13. As substantial evidence supports the ALJ's weighing of the medical opinions and Employer has not identified any error in his findings, we affirm his determination to accord greater weight to Dr. Forehand's opinion.[9] Decision and Order at 21.

Employer's arguments amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability and the record as a whole establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); *Rafferty*, 9 BLR at 1-232; Decision and Order at 22. Thus, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 22.

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,[10] or that "no part

[9] Employer asserts Claimant's non-qualifying objective studies support the opinions of its experts as to an absence of a disabling pulmonary impairment. Employer's Brief at 9-12. However, Employer does not identify any error in the ALJ's finding that Drs. McSharry's and Fino's disability assessments rely primarily on non-qualifying objective evidence and do not discuss the specific exertional requirements of Claimant's usual coal mine work.

[10] "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

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. Decision and Order at 21-25. We affirm the ALJ's finding that Employer failed to rebut the presumed existence of clinical pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23-25.

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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds that this standard requires Employer to show Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relied on the opinions of Drs. McSharry and Fino to rebut the presumption.[11] Decision and Order at 25-28. Dr. McSharry opined Claimant does not have legal pneumoconiosis but has asthma unrelated to coal mine dust exposure. Director's Exhibit 26 at 2. Dr. Fino suggested asthma or an elevated right diaphragm as possible causes of Claimant's mild respiratory impairment. Employer's Exhibit 2 at 12-13. The ALJ found their opinions speculative and inadequately explained, and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 26-28.

Employer asserts the ALJ improperly discounted these opinions by substituting his own interpretation of the objective testing, failing to resolve conflicting medical views regarding the nature of Claimant's impairment, and rejecting the physicians' opinions despite their explanation of the clinical findings. Employer's Brief at 12-15. Employer, however, does not identify any specific error in the ALJ's rebuttal findings under 20 C.F.R. §718.305(d) or explain how these opinions satisfy its burden to rebut the presumption. We,

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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).

[11] The ALJ correctly observed Dr. Forehand diagnosed Claimant with legal pneumoconiosis and therefore his opinion does not aid Employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 25-26; Director's Exhibits 13, 29, 30.

therefore, decline to address this argument. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

As the ALJ's findings are rational and supported by substantial evidence, we affirm his determination that the opinions of Drs. McSharry and Fino are insufficient to rebut the presumption of legal pneumoconiosis. 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] 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); *see* Decision and Order at 28-30. He discredited Drs. McSharry's and Fino's opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 28-30. As Employer does not challenge this determination, we affirm it. *See Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; *Skrack*, 6 BLR at 1-711; *Fish*, 6 BLR at 1-109. Because Employer did not rebut the Section 411(c)(4) presumption, we affirm the award of benefits.

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

GLENN E. ULMER
Acting Administrative Appeals Judge