**U.S. Department of Labor**

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

BRB No. 24-0471 BLA

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| CLARA J. DAWSON<br>(o/b/o KARL R. DAWSON, JR.)<br><br>Claimant-Respondent<br><br>v.<br><br>CONSOLIDATION COAL COMPANY<br><br>and<br><br>CONSOL ENERGY, INCORPORATED, c/o SMART CASUALTY CLAIMS<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | **NOT-PUBLISHED**<br><br>DATE ISSUED: 09/15/2025<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

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

Before: GRESH, Chief Administrative Appeals Judge, JONES, Administrative Appeals Judge, ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2021-BLA-05586) rendered on a subsequent claim filed on August 14, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The case is before the Benefits Review Board for a second time.[2]

In his previous Decision and Order on Modification, the ALJ found Claimant[3] established the Miner had 16.75 years of qualifying employment and a totally disabling respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Thus, he found Claimant established modification based on a mistake in a determination of fact. 20 C.F.R. §725.310.[4] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

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[1] On June 19, 2013, the district director denied the Miner's prior claim for benefits, filed on August 2, 2012. Director's Exhibit 1. Although the Miner demonstrated he had a totally disabling respiratory impairment, he failed to establish the existence of pneumoconiosis or that his totally disabling impairment was due to pneumoconiosis. *Id.* 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 he 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); *see 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). As the Miner's prior claim was denied for failure to establish that he had pneumoconiosis or that his total disability was due to pneumoconiosis, he had to submit new evidence establishing at least one of these elements to warrant a review on the merits of his claim. *White*, 23 BLR at 1-3; Director's Exhibit 1.

[2] Administrative Appeals Judge Melissa Lin Jones and Acting Administrative Appeals Judge Glenn E. Ulmer are substituted on the panel for Administrative Appeals Judges Judith S. Boggs and Greg J. Buzzard, who are no longer members of the Board.

[3] Claimant is the widow of the Miner, who died on November 1, 2016, and is pursuing the claim on his behalf. Decision and Order on Modification at 2 n.1; Director's Exhibit 11.

[4] When a request for modification is filed, "[t]he fact finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in

In consideration of Employer's appeal, the Board rejected Employer's arguments that the ALJ erred in admitting Claimant's Exhibits 1-3 into the record. *Dawson v. Consolidation Coal Co.*, BRB No. 22-0475 BLA, slip op. at 5-8 (Mar. 11, 2024) (unpub.). The Board affirmed the ALJ's findings that Claimant established total disability, thereby invoking the Section 411(c)(4) presumption, and that granting modification renders justice under the Act. *Id.* at 8-11.[5] The Board held, however, that the ALJ erred by failing to consider the opinions of Drs. Basheda and Farney on the issues of the rebuttal of legal pneumoconiosis and disability causation. *Id.* at 9-10. It therefore vacated the ALJ's determination that Employer did not rebut the Section 411(c)(4) presumption. *Id.* at 9-10. Accordingly, the Board vacated the award of benefits and remanded the case for further consideration. *Id.* at 12.

On remand, the ALJ again found Employer failed to rebut legal pneumoconiosis or disability causation. 20 C.F.R. §718.305(d)(1)(i)(A), (ii). Thus, he awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the presumption of legal pneumoconiosis. Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), declined to file a substantiative response.[6]

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.[7] 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).

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fact or change in conditions." *See Jonida Trucking Inc. v. Hunt*, 124 F.3d 739, 743 (6th Cir. 1997).

[5] Before ultimately granting a request for modification, the ALJ must determine whether doing so will render justice under the Act. *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327-28 (4th Cir. 2012).

[6] In the Director's letter electing not to file a substantiative response, he indicates in a footnote that Employer's reliance on *American Energy, LLC v. Director, OWCP* [*Goode*], 106 F.4th 319 (4th Cir. 2024), to argue that the ALJ wrongfully credited Drs. Hess's, Jaworski's, and Cohen's opinions diagnosing legal pneumoconiosis is misplaced because those opinions bear no weight on rebuttal of the Section 411(c)(4) presumption.

[7] 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*

**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,[8] 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). On remand, the ALJ found Employer failed to rebut the presumption of legal pneumoconiosis.[9]

**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." *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).

On remand, the ALJ considered Drs. Basheda's and Farney's opinions that the Miner did not have legal pneumoconiosis. Decision and Order on Remand at 12-15. Despite conceding the Miner's pulmonary function studies demonstrated a fixed obstructive impairment, Dr. Basheda diagnosed a severe "partially reversible (or variable) obstruction" based on his clinical history of intermittent wheezing responsive to steroid therapy.[10] Employer's Exhibit 3 at 14-16. Dr. Basheda attributed this obstruction to

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*Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (en banc); Director's Exhibit 5; Hearing Transcript at 9.

[8] "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). "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).

[9] In his original Decision and Order on Modification, the ALJ found Employer rebutted the existence of clinical pneumoconiosis. Decision and Order on Modification at 23. *Dawson v. Consolidation Coal Co.*, BRB No. 22-0475 BLA, slip op. at 9 n.10 (Mar. 11, 2024) (unpub.). The ALJ reiterated that finding on remand. Decision and Order on Remand at 11.

[10] Dr. Basheda noted Dr. Jaworski's January 2, 2013 pulmonary function study results yielded a severe-grade obstruction with "borderline" acute bronchodilator response. Employer's Exhibit 3 at 8, 13. He further observed Dr. Jaworski's September 22, 2016

smoking and asthma, not coal dust exposure, and explained that "a partially reversible or variable form of obstructive lung disease is characteristic of asthma and tobacco induced [chronic obstructive pulmonary disease (COPD)]" whereas "persistent, fixed obstruction is characteristic of coal dust." *Id.* at 13-14; Employer's Exhibit 7 at 30-31. Dr. Farney similarly diagnosed the Miner with "[severe] COPD secondary to tobacco smoke, asthma, or asthmatic bronchitis" and not coal dust exposure. Employer's Exhibit 4 at 19. He explained that although the Miner had seventeen years of coal mine employment, his job as a warehouse worker meant he was exposed to a concentration of coal dust "clearly . . . below" the fifteen-year underground mining threshold of exposure sufficient to cause pneumoconiosis. *Id.* at 19-20. The ALJ found the opinions of Drs. Basheda and Farney flawed and not well-reasoned; therefore he concluded Employer failed to rebut the presumption of legal pneumoconiosis. Decision and Order on Remand at 14-15. Contrary to Employer's assertion, we see no error in this finding.

Initially, we note Employer's assertion, that the opinions of its experts may be reasoned because the Preamble to the revised 2001 regulations does not establish a causal link between coal dust and all forms of COPD and asthma, reflects a misunderstanding of the applicable burden. Employer's Brief at 13-15. Employer's assertion, that a miner's COPD or asthma *may* be wholly unrelated to coal dust exposure, does not assist it in negating the presumption that the Miner's lung disease or impairment in this case is "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 Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555 (4th Cir. 2013); *Minich*, 25 BLR at 1-155 n.8; Decision and Order on Remand at 10. Therefore, because the ALJ accurately observed Dr. Basheda did not explain his basis for eliminating coal dust exposure as a contributing cause of the Miner's obstructive impairment, apart from explaining that the Miner had a partially reversible obstruction, the ALJ permissibly found his opinion "conclusory" and not well-reasoned. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); Decision and Order on Remand at 14; Employer's Exhibits 3, 7.

We also see no error in the ALJ's consideration of Dr. Farney's opinion. As the ALJ accurately observed, Dr. Farney predicated his opinion that the Miner's obstruction did not constitute legal pneumoconiosis on the belief that the Miner's levels of dust exposure in his seventeen years of aboveground work amounted to less than fifteen years of exposure in underground mining. Decision and Order on Remand at 13; Employer's Exhibit 4 at 19-20. As the Board previously affirmed the ALJ's finding that the Miner's aboveground coal mine employment was substantially similar to that in an underground mine, the ALJ permissibly found Dr. Farney's misunderstanding materially undermined

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pulmonary function study showed severe obstruction, without bronchodilator response, that had worsened since the 2013 study. *Id.* at 10, 13; Employer's Exhibit 7 at 16.

his opinion. *See Looney*, 678 F.3d at 310; *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (ALJ may discount physician opinion that is based on facts contrary to the ALJ's findings); *Dawson*, BRB No. 22-0475 BLA, slip op. at 4-7; Decision and Order on Remand at 14. The ALJ thus permissibly found Dr. Farney's opinion is insufficiently reasoned and does not rebut the presumption of legal pneumoconiosis. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (effect of an inaccurate exposure history on the credibility of a medical opinion is a determination for the ALJ to make).

It is the ALJ's function to weigh the evidence, draw appropriate inferences and determine credibility. *See 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). Employer's arguments on appeal are a request 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 acted within his discretion in rejecting Drs. Basheda's and Farney's opinions, the only opinions supportive of Employer's burden to prove the Miner did not have legal pneumoconiosis, we affirm his determination that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order on Remand at 14-15. 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).[11]

**Disability Causation**

The ALJ next considered whether Employer established that "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 found Drs. Basheda's and Farney's opinions entitled to little weight because they did not diagnose legal pneumoconiosis, contrary to his finding that the Miner had the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015). As Employer does not challenge the ALJ's disability causation finding, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 15-18.

[11] We need not address Employer's arguments concerning the opinions of Drs. Cohen, Hess, and Jaworski because their diagnoses of legal pneumoconiosis do not assist Employer in proving the Miner did not have the disease. *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"); Decision and Order on Remand at 12; Decision and Order on Modification at 22-24; Employer's Brief at 19-24.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge