**U.S. Department of Labor**

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

BRB No. 22-0275 BLA

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| MILES SPARKMAN | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| WHITAKER COAL CORPORATION c/o SUNCOKE ENERGY, INCORPORATED | ) | |
| | ) | |
| and | ) | |
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| SELF-INSURED THROUGH WHITAKER COAL CORPORATION c/o WELLS FARGO DISABILITY MANAGEMENT | ) | DATE ISSUED: 02/10/2023 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2019-BLA-05886) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on May 7, 2018.[1]

The ALJ credited Claimant with at least fifteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, 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), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's third claim for benefits. Director's Exhibits 1, 2, 4. On September 8, 2015, the district director denied his most recent prior claim because he did not establish any element of entitlement. *Id*.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] 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); *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 did not establish he suffers from pneumoconiosis and total respiratory disability in his prior claim, he had to submit evidence establishing either of these elements of entitlement to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309; Decision and Order 2 (citing Director's Exhibit 2).

On appeal, Employer asserts that the ALJ erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assoc., 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 [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.[7]

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[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established more than fifteen years of qualifying coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-5.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11, 27; Director's Exhibit 7.

[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 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 clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 6.

## 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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, requires Employer to establish 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)).

The ALJ considered the opinions of Drs. Broudy and Tuteur that Claimant does not have legal pneumoconiosis. Employer's Exhibits 3, 4, 13-15. Dr. Broudy opined Claimant has hypoxemia due to morbid obesity and cardiac disease and unrelated to coal mine dust exposure. Employer's Exhibit 3. Dr. Tuteur opined Claimant does not have a "primary" pulmonary impairment but rather has symptoms of progressive breathlessness and exercise intolerance caused by coronary artery disease and obesity. Employer's Exhibits 4, 13-15. He further opined Claimant's arterial blood gas testing demonstrates no "persistent" impairment of oxygen gas exchange, but rather "intermittently mild" alveolar hypoventilation associated with morbid obesity. *Id.* The ALJ found their opinions unpersuasive and thus do not satisfy Employer's burden of proof. Decision and Order at 8-11.

Employer argues the ALJ applied an incorrect legal standard when discrediting the opinions of Drs. Broudy and Tuteur. Employer's Brief at 4-5. We disagree. As the ALJ correctly observed, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order 5-6. He correctly noted that this requires Employer to prove Claimant's impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 5-6 (citing 20 C.F.R. §718.201(b)); *see Young*, 947 F.3d at 405; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); 20 C.F.R. §718.201(a)(2), (b). Moreover, the ALJ did not discredit the opinions of Drs. Broudy and Tuteur based on application of an incorrect standard. Rather, he found their rationales for opining Claimant does not have legal pneumoconiosis unpersuasive. Decision and Order at 7-11.

Specifically, Dr. Broudy opined Claimant's hypoxemia is not legal pneumoconiosis because "there was neither the necessary radiographic or pathologic changes required to make such a diagnosis." Employer's Exhibit 3. The regulations provide, however, that a claim for benefits must not be denied solely on the basis of a negative chest x-ray and legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012) (affirming ALJ's discrediting of physician who relied on negative radiographic evidence to exclude a diagnosis of legal pneumoconiosis, as legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.201, 718.202(a)(4), (b). Thus substantial evidence supports the ALJ's finding that Dr. Broudy's rationale is unpersuasive. Decision and Order at 8 n.24.

Dr. Tuteur excluded legal pneumoconiosis based on his opinion that Claimant does not have a persistent impairment of gas exchange on arterial blood gas testing. Employer's Exhibit 14 at 11-13. He explained that when arterial blood gas test results were adjusted for barometric pressure, one earlier study evidenced an impairment in gas exchange but subsequent studies did not. *Id*. He explained that "when earlier studies show impairment and that is reversed, that earlier impairment, whether [it is] ventilatory in spirometry or arterial blood gas analysis with respect to gas exchange, could not have been due to a coal mine dust induced process." *Id*. The ALJ permissibly found this rationale unpersuasive because Dr. Tuteur did not address that even "after Claimant's arterial blood gas results improved they were still near qualifying." Decision and Order at 11; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Finally, the ALJ acknowledged both Drs. Broudy and Tuteur opined Claimant's coronary artery disease and morbid obesity caused his hypoxemia, but permissibly found their opinions unpersuasive because neither physician adequately explained why Claimant's history of coal mine dust exposure did not contribute to or aggravate his respiratory impairment. *See Huscoal, Inc. v. Director, OWCP* [*Clemons*], 48 F.4th 480, 489-90 (6th Cir. 2022); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 8-11; Employer's Brief at 5-8.

Employer generally argues the ALJ should have found the opinions of Drs. Broudy and Tuteur well-reasoned and documented. Employer's Brief at 4-9. We consider its argument to be a request that the Board 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 the opinions of Drs. Broudy and Tuteur, we

affirm his finding Employer did not disprove legal pneumoconiosis.[8] 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**

Employer contends the ALJ applied an incorrect legal standard for rebutting disability causation. Employer's Brief at 4. We disagree.

The ALJ correctly observed that to rebut disability causation, Employer must establish that "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 12. Moreover, he permissibly discredited the opinions of Drs. Brody and Tuteur regarding the cause of Claimant's total respiratory disability because they failed to diagnose legal pneumoconiosis. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 12; Employer's Brief at 14-15. Therefore, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[8] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Broudy and Tuteur, we need not address Employer's additional arguments as to why the ALJ erred in weighing their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 8-11; Employer's Brief at 5-9. Similarly, as Employer bears the burden of proof on rebuttal and having affirmed the ALJ's rejection of Employer's experts, we need not address its argument that the ALJ erred in crediting the opinions of Drs. Nader and Raj diagnosing legal pneumoconiosis, as they do not aid Employer on rebuttal. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *see* Decision and Order at 11; Employer's Brief at 9-12.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge