U.S. Department of Labor

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

BRB Nos. 23-0104 BLA
and 23-0359 BLA

ROY D. CLY (Deceased) Claimant-Respondent v. PEABODY WESTERN COAL COMPANY and PEABODY ENERGY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**NOT-PUBLISHED** DATE ISSUED: 10/28/2024 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Attorney Fee Order of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

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

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

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C.,

for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Awarding Benefits and Attorney Fee Order (2017-BLA-05833) rendered on a claim filed on July 23, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 36.5 years of surface coal mine employment and found he worked in conditions substantially similar to those in an underground mine. She further found the evidence established the Miner had a totally disabling pulmonary or respiratory impairment, 20 C.F.R. §718.204(b)(2), and therefore found Claimant[1] invoked the rebuttable 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 determined Employer did not rebut the presumption and awarded benefits.[3]

[1] The Miner died on November 17, 2022. Claimant's February 20, 2023 Letter. The Miner's widow is pursuing the claim on his behalf. *Cly v. Peabody Western Coal Co.*, BRB No. 23-0104 BLA (June 21, 2023) (Order) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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] Pursuant to a request for reconsideration by the Director, Office of Workers' Compensation Programs, the ALJ issued an Order Granting Motion for Reconsideration and Amending Decision and Order Awarding Benefits on November 25, 2022, holding that the Miner's benefits should not be offset based upon his award of benefits under the Energy Employees Occupational Illness Programs and the Radiation Exposure Compensation Act for pulmonary fibrosis resulting from his employment in uranium mining. *Cly v. Peabody Western Coal Corp*., OALJ No. 2017-BLA-05833 (Nov. 25, 2022) (Order) (unpub).

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution.[4] It further asserts the removal provisions applicable to the ALJ render her appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption. Employer further argues the ALJ erred in finding it did not rebut the presumption. It also argues the ALJ erred in not finding Claimant's award of benefits offset pursuant to 20 C.F.R. §725.533(a)(2). Finally, Employer challenges the ALJ's award of attorney's fees.

Claimant responds in support of the award of benefits and attorney's fees. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the ALJ's Decision and Order Awarding Benefits. Employer has filed a reply brief, reiterating its positions.[5]

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.[6] 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 (1965).

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[4] 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.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had 36.5 years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the Miner performed his coal mine employment in Arizona. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Appointments Clause/Removal Provisions

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).[7] Employer's Brief at 32-38.[8] In addition, it challenges the constitutionality of the removal protections afforded Department of Labor ALJs. *Id.* It generally argues the removal provisions for ALJs included 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*. *Id.* at 35. 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), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Invocation of the Section 411(c)(4) Presumption

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or surface coal mines in conditions

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[7] *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 ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237 (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.

[8] Employer argues that the ALJ "adjudicated the case when [s]he was not properly appointed," and that the "subsequent 'ratification' . . . [the ALJ] referenced" did not cure this issue. Employer's Brief at 33. However, contrary to Employer's argument, the ALJ's appointment was not ratified after she was assigned the case. Rather, the Secretary of Labor specifically "appoint[ed]" her as an ALJ at the DOL to "execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office[,] U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105," more than a year prior to the assignment of this case to her. January 21, 2020 Notice of Hearing and Prehearing Order; Secretary's September 12, 2018 Letter to ALJ Hoffman. Moreover, the Ninth Circuit Court of Appeals, under whose jurisdiction this claim arises, considered the Secretary's December 2017 ratification of all sitting ALJs and found it plainly sufficient to "cure[] any constitutional defect" in the pre-*Lucia* appointment of DOL ALJs. *See Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1127 n.1 (9th Cir. 2021).

"substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).[9]

Employer asserts the ALJ erred in finding the Miner's surface coal mine employment qualifying based on his testimony that the mine's conditions were "dusty." Employer's Brief at 38-39. We disagree.

The ALJ noted the Miner testified he performed all of his coal mine employment at a surface mine where he was regularly exposed to coal and rock dust on a daily basis as a heavy equipment operator. Decision and Order at 8-9; Hearing Transcript at 61-62. As the ALJ further noted, the Miner testified he inhaled fine coal dust even through a safety apparatus, he would have to "spit out the fine dust that [he] inhaled," and his "body would be black from the coal dust" after his shifts. *Id.* The ALJ also noted the Miner reported to both Drs. Green and Farney that his work operating heavy equipment at a surface mine involved regular exposure to coal dust. Decision and Order at 9; Claimant's Exhibit 6; Employer's Exhibit 2. Based on the Miner's "fully credible" testimony and the consistency of the information he provided to Drs. Green and Farney, the ALJ rationally found Claimant established the Miner was regularly exposed to coal mine dust. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (miner's testimony that the conditions throughout his employment were "very dusty" met the burden to establish he was regularly exposed to coal mine dust); *Bizarri v. Consolidation Coal*

[9] Employer further challenges the validity of 20 C.F.R. §718.305(b)(2) "out of an abundance of caution," stating that the regulation has eliminated the distinction between underground and surface mines and that "regular exposure does not equate to the intensity or extent of exposure." Employer's Brief at 39. We reject this argument. The United States Court of Appeals for the Seventh Circuit, in interpreting the originally enacted Section 411(c)(4), acknowledged "Congress, at the very least, was aware that underground mines are dusty and that exposure to coal dust causes pneumoconiosis" and held "in order to qualify for the presumption of § 411(c)(4), a surface miner must only establish that he was exposed to sufficient coal dust in his surface mine employment." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 300-03 (6th Cir. 2018); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018).

Co., 7 BLR 1-343, 1-344-345 (1984) (ALJ may rely on a miner's testimony, especially if the testimony is not contradicted by any documentation of record).

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that Claimant established the Miner worked in conditions substantially similar to those in an underground mine and consequently had at least fifteen years of qualifying coal mine employment.[10] *See* 20 C.F.R. §718.305(b)(2); *see also Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014).

Totally Disabling Respiratory Impairment

A 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. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, 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-Pro ducts 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 arterial blood gas studies, medical opinions, and the evidence as a whole.[11] Decision and Order at 33; *see* 20 C.F.R. §718.204(b)(2)(ii), (iv).

Arterial Blood Gas Studies

The ALJ considered three arterial blood gas studies conducted on October 11, 2001, March 10, 2015, and November 3, 2016. Decision and Order at 12-13. The October 11,

[10] We reject Employer's unsupported assertion that the factfinder must determine the intensity or extent of coal dust exposure in evaluating whether a claimant met the "substantially similar" standard. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); Employer's Brief at 39.

[11] The ALJ found Claimant did not establish total disability based on the pulmonary function studies 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 12, 15.

2001 and November 3, 2016 studies produced non-qualifying[12] values at rest, while the March 10, 2015 study produced non-qualifying values at rest and qualifying values during exercise. Director's Exhibit 13; Employer's Exhibits 2, 10. Finding the exercise study to be the most probative of whether the Miner could perform his usual coal mine employment, the ALJ found the arterial blood gas studies establish total disability. 20 C.F.R §718.204(b)(2)(ii); Decision and Order at 13-15; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (exercise studies may be more probative than resting blood gas studies regarding whether a miner is capable of performing his coal mine work); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984).

Employer contends the ALJ failed to consider and resolve the physicians' opinions that the exercise study was unreliable. Employer's Brief at 41. We disagree.

Dr. Sood, who conducted the March 10, 2015 exercise study, explained that "[e]xercise was performed maximally on a treadmill using Bruce protocol for 6 minutes and 20 seconds." Director's Exhibit 13 at 3. He reported that the test was ended due to shortness of breath but peak activity occurred at a speed of 2.5 miles per hour and an elevation of 12%. *Id*. Dr. Renn reviewed the study but opined that the study was overly strenuous for the Miner based on his heartrate and the use of an incline "greater than any surface mountain road." Director's Exhibit 15. Dr. Sood responded that the study was "useful, safe, and efficient" and that the best way to determine an individual's ability to perform bouts of heavy labor, as the Miner's usual coal mine job required, is to perform maximal exercise. Director's Exhibit 17. Dr. Rosenberg also reviewed the exercise testing and opined that, while qualifying for disability, the Miner's blood gases would be normal when corrected for the barometric pressure and altitude. Employer's Exhibit 20 at 19-20. Dr. Farney reviewed the study and expressed "concerns" about the validity of the study, as the Miner's blood counts increased and his PaO2 values may have been overestimated based on the lower than predicated A-a gradient. Employer's Exhibit 2 at 11.

Contrary to Employer's arguments, the ALJ considered the opinions of Drs. Rosenberg and Farney and found them unpersuasive.[13] Decision and Order at 13-14; Employer's Brief at 41-42. The ALJ correctly noted the test was performed in compliance

[12] A "qualifying" blood gas study yields values that are equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

[13] We affirm, as unchallenged on appeal, the ALJ's determination that Dr. Renn's opinion that the arterial blood gas study is unreliable is unpersuasive. *Skrack*, 6 BLR at 1-711; Decision and Order at 14.

with the regulations, which allows tests to be performed below 2,999 feet above sea level. Decision and Order at 15; *see* 20 C.F.R. Part 718, Appendix C. Because the regulations already account for the effects of elevation, we see no error in the ALJ's finding that Dr. Rosenberg's opinion that the test would be non-qualifying if corrected for elevation is unpersuasive. *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990) (DOL regulations already account for the effects of elevation and altitude); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361-62 (1984) (party challenging the validity of a study has the burden to establish the results are invalid or unreliable); *see also Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed. App'x. 551, 560 (4th Cir. 2004) (upholding ALJ's discrediting an opinion that contradicts Appendix C); Decision and Order at 14-15. Similarly, the ALJ permissibly found Dr. Farney's opinion that the A-a gradient was lower than expected, "suggest[ing]" that the Miner's pO2 value was over-estimated, to be speculative and accorded it little weight. *See Opp*, 746 F.3d at 1127; Decision and Order at 14; Employer's Exhibit 2 at 11.

Consequently, because it is supported by substantial evidence, we affirm the ALJ's determination that the blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 14.

Medical Opinion Evidence

Prior to determining whether the medical opinion evidence establishes total disability, the ALJ found the Miner's usual coal mine employment as a heavy equipment operator required moderate to heavy labor. Decision and Order at 10. Employer contends the ALJ failed to take into consideration that the heavier portions of the Miner's work occurred only a limited numbers of times per day and thus overestimated the exertional requirements of his work. Employer's Brief at 47. We disagree.

As the factfinder, an ALJ is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Opp*, 746 F.3d at 1127; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Moreover, in establishing the exertional requirements of a miner's usual coal mine employment, an ALJ must determine the exertional requirements of the most difficult job the miner performed. *See Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). She cannot base a finding of a miner's exertional requirements solely on the least demanding aspects of a job. *Id.*

The ALJ considered the Miner's Form CM-913 Description of Coal Mine Work and reports of his usual coal mine work contained in the opinions of Drs. Sood, Green, and Farney. Decision and Order at 9-10. The Miner indicated his most recent job as a heavy equipment operator and laborer included shoveling coal, pushing coal into the hopper, and loading coal into trucks. Director's Exhibit 4. He further indicated the job required lifting

150 pounds two times per day and 500 pounds once daily with a team. *Id.* Drs. Sood and Green similarly reported the Miner's most recent job required operating heavy equipment; shoveling coal; pushing coal into a hopper; loading coal into a truck; and unloading supplies weighing 150 pounds twice a day, and 500 pounds once a day. Director's Exhibit 13 at 2; Claimant's Exhibit 6. Dr. Farney reported the Miner "would be required to perform some manual labor which he considered strenuous," like shoveling coal. Employer's Exhibit 2 at 3. Based on the relevant uncontradicted evidence, the ALJ permissibly found the Miner's last coal mine job as heavy equipment operator, which required lifting 150 to 500 pounds around three times a day and carrying around 15-pound shovels of coal, regularly required moderate and heavy levels of exertion. Decision and Order at 9-10; *see Opp*, 746 F.3d at 1127; *Eagle*, 943 F.2d at 512 n.4.

The ALJ then considered the medical opinions of Drs. Sood, Green, Farney, and Rosenberg. Decision and Order at 15-33. Drs. Sood and Green opined the Miner was totally disabled. Director's Exhibits 13, 17; Claimant's Exhibit 6. Drs. Farney and Rosenberg opined he was not. Employer's Exhibits 2, 6, 19, 20, 23-25. Crediting the well-reasoned opinions of Drs. Sood and Green, the ALJ found the preponderance of the medical opinion evidence supported a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 33.

Employer argues that the ALJ's findings should be vacated because she failed to consider the Miner's advanced age and other conditions in determining whether he could do his usual coal mine employment and that benefits should not be conferred by "parity reasoning" as the Miner's "advanced age, as well as other non-respiratory conditions," rendered him disabled. Employer's Brief at 48. To the extent Employer is arguing that the Miner should be precluded from receiving benefits if he had another disabling impairment, we reject this argument. *Howard*, 25 BLR at 1-318-19; 20 C.F.R. §718.204(a) ("any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,920, 79,923, 79,946 (Dec. 20, 2000). Moreover, the ALJ properly considered only whether Claimant established the Miner had a totally disabling respiratory or pulmonary impairment that would render him totally disabled from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2); Decision and Order at 10-33.

Nor are we persuaded by Employer's argument that the ALJ erred in her weighing of the medical opinion evidence. Employer's Brief at 47-51.

The ALJ credited the opinions of Drs. Sood and Green, that the Miner had a totally disabling respiratory impairment based on his exercise blood gas study results, as reasoned and documented and supported by the objective testing. Decision and Order at 32.

Similarly, she discredited Dr. Rosenberg's opinion, that the Miner was not disabled, as not supported by the objective evidence. *Id*. Having affirmed the ALJ's finding that Claimant established total disability based on the valid and qualifying exercise blood gas study, we affirm her crediting of the opinions of Drs. Sood and Green as consistent with this evidence and her discrediting of Dr. Rosenberg's opinion at 20 C.F.R. §718.204(b)(2)(iv). *See Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015).

Moreover, the ALJ accurately found that Dr. Farney, who initially opined the Miner was not disabled, subsequently stated that while he had the respiratory capacity to run a bulldozer, he would have difficulty performing any other physical labor. Decision and Order at 32; Employer's Exhibit 19 at 30-31. As the ALJ found the Miner's work required medium to heavy labor, she determined Dr. Farney's opinion supports a finding of total disability; as Employer does not specifically challenge this finding, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); Decision and Order at 32.

We thus affirm, as supported by substantial evidence, the ALJ's determination that the preponderance of the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 33. We further affirm the ALJ's determination, based on a weighing of the evidence as a whole, that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and therefore invoked the Section 411(c)(4) presumption. *Id.*; 20 C.F.R. §718.305(b)(1)(iii); *see Rafferty*, 9 BLR at 1-232.

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,[14] or "no

[14] "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).

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 did not establish rebuttal by either method.

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." 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).

Employer relied on the opinions of Drs. Farney and Rosenberg to disprove legal pneumoconiosis. Dr. Farney opined the Miner had usual interstitial pneumonitis caused by uranium exposure, he attributed any impairment and respiratory symptoms to this disease, and he opined the Miner did not have legal pneumoconiosis. Employer's Exhibit 24 at 53-57. Similarly, Dr. Rosenberg opined the Miner had pulmonary fibrosis due to uranium exposure and unrelated to coal dust exposure. Employer's Exhibit 25 at 3-4. The ALJ found the physicians' opinions inadequately reasoned and thus found Employer did not disprove legal pneumoconiosis. Decision and Order at 41.

Employer argues the ALJ erred in discrediting their opinions. Employer's Brief at 39-51. We disagree.

Both Drs. Farney and Rosenberg excluded legal pneumoconiosis based on the lack of a pulmonary impairment indicated on his pulmonary function studies as well as his x-ray evidence of pulmonary fibrosis allegedly due to uranium exposure. Employer's Exhibits 2, 6; *see* Employer's Brief at 39-51. The ALJ reasonably found both physicians "simply asserted [the Miner's] uranium mining exposure was worse" and did not adequately explain why the Miner's "very significant" history of coal mine dust exposure is not also a contributing or aggravating factor to his pulmonary disease and hypoxia. *See Opp*, 746 F.3d at 1127; *Stallard*, 876 F.3d at 673-74 n.4; Decision and Order at 42.

The ALJ has discretion, as the factfinder, to weigh the evidence, draw inferences, and determine credibility. *See Opp*, 746 F.3d at 1127. The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Id*. Because the ALJ provided valid reasons for discrediting the opinions of Drs. Farney and Rosenberg, the only medical opinions supportive of Employer's burden, we affirm her finding that Employer failed to disprove legal pneumoconiosis.[15] *See Minich*, 25 BLR at 1-155 n.8. Therefore, we affirm

[15] We reject Employer's challenge to the ALJ's use of the preamble to the 2001 revised regulations as the ALJ did not rely on the preamble to discredit Employer's experts

her finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 48. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner'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 48-39. The ALJ permissibly discredited the opinions of Drs. Farney and Rosenberg because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 49. We therefore affirm the ALJ's conclusion that Employer failed to establish no part of the Miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Offset of Benefits Under 20 C.F.R. §725.533(a)(2)

Employer argues the ALJ erred in finding 20 C.F.R. §725.533(a)(2) inapplicable and contends the Miner's benefits under the Act should be reduced by the amount of the Miner's benefits from claims under the Radiation Exposure Compensation Act (RECA) and Energy Employees Occupational Illness Compensation Program Act (EEOICPA). Employer's Brief at 51-52. We disagree.

State or federal benefits a Miner receives for disability due to pneumoconiosis reduce, or offset, the amount of federal black lung benefits to which the Miner is entitled. 20 C.F.R. § 725.533(a). The regulations provide an employer is not entitled to an offset when the related benefits are due to a disability other than pneumoconiosis. *See Sammons*

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on legal pneumoconiosis. *See* Employer's Brief at 39-40; *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").

[16] We need not address Employer's contentions relevant to clinical pneumoconiosis, as we have affirmed the ALJ's findings on legal pneumoconiosis and her conclusion that Employer is unable to rebut the Section 411(c)(4) presumption by establishing the Minerdoes not have pneumoconiosis. *See Shinseki*, 556 U.S. at 413; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); Decision and Order at 42, 48; Employer's Brief at 45-46.

v. Wolf Creek Collieries, 1994 WL 712499, BRB No. 94-0643 BLA (Nov. 25, 1994) (denying offset for Federal Employees' Compensation Act award where miner's accidental death was unrelated to pneumoconiosis).

The ALJ accurately found the Miner's RECA and EEOICPA awards arose from his uranium mining employment and resulting pulmonary fibrosis. *Cly v. Peabody Western Coal Corp.*, OALJ No. 2017-BLA-05833, slip op. at 2-3 (Nov. 25, 2022) (Order) (unpub.); Employer's Exhibits 13, 14. As the ALJ noted, since the Act defines pneumoconiosis as a distinct disease arising from coal mine employment, the Miner had "two [separate] compensable occupational diseases." November 25, 2022 Order at 2-3. We thus affirm the ALJ's finding that the Miner's benefits under the Act should not be reduced by any amount received as benefits for his claims under EEOICPA and RECA. *Id.* at 3.

Attorney Fee Award

Claimant's counsel (Counsel) submitted an itemized fee petition to the ALJ requesting $21,087.50 in fees and $4,619.00 in expenses for work performed before the ALJ on behalf of Claimant from July 13, 2021, to October 4, 2022. Counsel additionally submitted a supplemental fee petition to the ALJ requesting $825.00 in fees for work performed before the ALJ on behalf of Claimant from October 17, 2022 to November 30, 2022. Counsel requested hourly rates at $350.00 for legal services performed by Joseph E. Wolfe and Donna E. Sonner, $300.00 for legal services performed by Brad A. Austin, and $200.00 for legal services performed by Rachel Wolfe. After considering the fee petition, Employer's objections, and the regulatory criteria at 20 C.F.R. §725.366, the ALJ found the requested hourly rates are reasonably representative of the prevailing market rate and commensurate with the attorneys' qualifications and work performed. Attorney Fee Order at 6-9. She further found most of the billing entries reasonable and subsequently awarded Counsel $20,560.00 in fees and $4,319.00 in costs, for a total of $24,969.00. *Id.* at 8-9.

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 568-69 (4th Cir. 2013); *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Hourly Rate

Under fee-shifting statutes, the United States Supreme Court has held that courts must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the

"lodestar" amount. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *See Gosnell*, 724 F.3d at 572; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010).

An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see Van Skike v. Director, OWCP*, 557 F.3d 1041, 1046 (9th Cir. 2009).

Employer argues the ALJ erred in determining the prevailing market rate for Mr. Wolfe and Ms. Sonner based on past fee awards in black lung cases.[17] Employer's Brief at 55. We disagree.

Counsel requested an hourly rate of $350.00 for the work of Mr. Wolfe and Ms. Sonner in this case. Fee Petition at 1-2. In support of the fee petition in this case, he submitted their experience in litigating black lung claims and over fifty fee petitions from 2006 to 2017 in which Mr. Wolfe was awarded an hourly rate between $300.00 and $425.00 for work performed before the Office of Administrative Law Judges, the Benefits Review Board, and the United States Court of Appeals for the Fourth Circuit. *Id.* at 2-11. Counsel also submitted the National Law Journal's 2014 Survey of Law Firm Economics for the South Atlantic Region showing a higher requested rate for attorneys with similar experience to Mr. Wolfe and Ms. Sonner. *Id.* The ALJ considered this information, alongside affidavits submitted by Employer that it alleged showed a lower market rate. Employer's Opposition to Fee Petition at 5.

The ALJ determined that Ms. Sonner had equivalent experience to Mr. Wolfe and noted that the seven most recent fee petitions demonstrate Mr. Wolfe received an hourly rate between $300.00 and $425.00 in 2017, before he began work on this case. Fee Order at 4. She found that these prior fee awards are probative evidence of the prevailing market

[17] Employer states it is "unclear" why Mr. Austin's requested hourly rate is higher than Ms. Wolfe's and how much experience they have in black lung and non-black lung related litigation. Employer's Brief at 54. As Employer does not allege any specific error committed by the ALJ in determining Mr. Austin's and Ms. Wolfe's hourly rates, we reject its argument as inadequately briefed. *Cox*, 791 F.2d at 446-47.

rate. *Id*. The ALJ further found those rates were supported by the 2014 Survey, which demonstrates higher rates than those requested by attorneys in the south Atlantic region, tending to demonstrate that the lower requested rate was in fact reasonable. *Id*. In addition, the ALJ found the affidavits submitted by Employer were of limited relevance as Employer did not establish any equivalency or similarity between the affiants' experiences, skills, and reputation and that of Mr. Wolfe and Ms. Sonner. *Id*. Finally, the ALJ noted that those affidavits include one from attorney Thomas W. Moak, in which he states the market rate for black lung attorneys is "$300.00 to $450.00 an hour" in 2022. *Id*. Based on this evidence, the ALJ found the hourly rates of $350.00 for Mr. Wolfe and Ms. Sonner to be reasonable. *Id*. at 4-5.

Contrary to Employer's arguments, evidence of fees received in other black lung cases may be appropriate consideration in establishing a market rate. *See Gosnell*, 724 F.3d at 572; *see also Shirrod v. Director, OWCP*, 809 F.3d 1082, 1086 (9th Cir. 2015) (ALJ has broad discretion to determine the prevailing market rate). Moreover, the ALJ did not rely solely on past fee awards to determine the market rate but also considered the attorneys' experience and compared their requested rates to the rates listed in a regional survey of similarly experienced practicing attorneys and the affidavits submitted by Employer.[18] Fee Order at 4; *see Gosnell*, 724 F.3d at 575 n.12. Because it is supported by substantial evidence, we affirm the ALJ's approval of Mr. Wolfe's and Ms. Sonner's hourly rate of $350.00 for services performed in this case before the ALJ.[19] *Blum*, 465 U.S. at 896 n.11.

Billable Hours

Employer also objects to a four-hour time entry for legal assistant work on September 2, 2021, as excessive. Employer's Brief at 56. The entry states: "Review and analyze evidence in file and prepare packet of medical evidence to forward to Dr. Sood for review to prepare for testimony at client's hearing scheduled on [October 14, 2021].

[18] Employer also argues that the passage of time is not a basis to justify a $350.00 hourly rate; however, it fails to point to where Counsel provides this justification for its fee request or where the ALJ relied on Counsel's justification to determine the hourly rate. *See* Employer's Brief at 57. As Counsel's fee petition reflects no such justification, we reject Employer's argument.

[19] We reject Employer's argument that the ALJ impermissibly referenced subjective factors such as experience to determine the hourly rates. *See* Employer's Brief at 54; *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984) (defining "relevant community" as attorneys with comparable experience).

Forward to Attorney for review before sending via email; forward to Dr. Sood following Attorney's review." Claimant's Fee Petition (Nov. 28, 2022) at 17. The ALJ found the amount of time charged to be facially reasonable and Employer failed to support its objection with specific allegations. Fee Order at 7. She additionally noted the tasks performed by the legal assistant are "work that certainly could have been performed by an attorney," belying Employer's argument that counsel did not effectively use the service of paralegals. *Id.* As Employer has not alleged any specific error with the ALJ's findings or explained why it believes the time to be excessive, it has not adequately demonstrated that the ALJ abused her discretion in allowing this time; thus we affirm her findings. *See Bentley*, 522 F.3d at 666-67. We therefore affirm the ALJ's attorney fee award.[20]

[20] Employer additionally objects to Counsel's entry for a $300.00 language interpretation fee, *see* Employer's Brief at 58, but the ALJ sustained Employer's objection below and disallowed that expense. Fee Order at 8.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and her Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring.

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge