U.S. Department of Labor

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

BRB No. 23-0264 BLA

JULIEN B. GOURDIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON MINING, INCORPORATED	)	
	)	DATE ISSUED: 04/18/2024
Employer-Petitioner	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for Employer.

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

William M. Bush (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, BUZZARD and JONES, Administrative Appeals Judges.

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2020-BLA-06039) rendered on a subsequent claim[1] filed May 18, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Chevron Mining, Inc. is the responsible operator. He accepted the parties' stipulation that Claimant has eleven years of coal mine employment, and therefore found Claimant could not invoke 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). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b), and the existence of legal pneumoconiosis, 20 C.F.R. §718.202, and therefore found he established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309. The ALJ further found Claimant established his pneumoconiosis is a substantially contributing cause of his totally disabling impairment. 20 C.F.R. §718.204(c). Thus he awarded benefits.

[1] Claimant filed his first claim for benefits on March 19, 2009. Director's Exhibit 1. The district director denied the claim on October 20, 2009, for failure to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. *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 or pulmonary 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 pneumoconiosis or a totally disabling respiratory or pulmonary impairment in his prior claim, evidence establishing one of those elements was required to obtain review of the merits of his current claim. *Id*.

On appeal, Employer argues the district director is an inferior officer not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II, § 2, cl. 2.[4] It also argues the authority granted district directors deprived it of due process in this claim. Further, Employer argues the ALJ erred in finding it is the properly designated responsible operator liable for the payment of benefits. On the merits of entitlement, Employer argues the ALJ erred in finding Claimant established the existence of legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment. Finally, it argues the ALJ erred in finding Claimant established his pneumoconiosis is a substantially contributing cause of his total disability.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging the Benefits Review Board to affirm the ALJ's determination that Employer is the properly designated responsible operator. Employer filed a consolidated reply to the Claimant's and Director's briefs, reiterating its contentions.

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 (1965).

Constitutional Arguments

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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] This case arises under the jurisdiction of the United States Court of Appeals for the Tenth Circuit, as Claimant performed his coal mine employment in New Mexico. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 34.

Employer argues the district director is an inferior officer not properly appointed under the Appointments Clause.[6] Employer's Brief at 38. It further argues the regulatory scheme whereby the district director must initially determine the liability of a responsible operator and its carrier when at the same time the Department of Labor (DOL) administers the Black Lung Disability Trust Fund creates a conflict of interest that violates its due process right to a fair hearing. Employer's Brief at 36-37. It urges the Board to vacate the ALJ's Decision and Order and transfer liability to the Trust Fund. *Id*. at 36-38.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-323, 1-327-32, 1-338-39 (2022). For the reasons set forth in *Bailey*, we reject Employer's arguments.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494,[7] that most recently employed the miner" for at least one year. 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director identifies a potentially liable operator, that operator may be relieved of liability only if it proves it is financially incapable of assuming liability for benefits, or another operator more recently employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

If a successor relationship is established, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof,

[6] Employer first raised this argument in its brief to the Board. Employer's Brief at 38.

[7] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a).

The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 5-6. Employer argues the ALJ erred in finding it employed Claimant for a period of at least one year. Employer's Brief at 21-23; *see* 20 C.F.R. §725.494(c). We disagree.

The ALJ found Chevron Mining, Inc. (Employer), was formerly named The Pittsburgh & Midway Coal Mining Company (P&M), and that P&M became a successor operator to Kaiser Steel Resources, Inc. & Subsidiaries (Kaiser) after assuming control of Kaiser in 1989. Decision and Order at 4-6. Employer does not challenge these findings; thus we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

To determine the length of Claimant's employment history with these entities, the ALJ considered an employment verification letter Claimant obtained from P&M. Decision and Order at 4-6; *see* Director's Exhibit 6. The letter states Claimant was employed with Kaiser for approximately 11.8 years from May 17, 1971 to March 4, 1983, and for approximately one month with P&M from March 15 to April 21, 1993. Director's Exhibit 6. Because the ALJ found P&M to be a successor operator to Kaiser, he accurately noted "any coal mine employment Claimant accrued while working for [Kaiser] shall be deemed employment with [P&M.]"[8] Decision and Order at 5-6 (citing 20 C.F.R. §725.493(b)(1) ("In any case in which an operator may be considered a successor operator, as determined in accordance with [20 C.F.R.] § 725.492, any employment with a prior operator shall also be deemed to be employment with the successor operator.")). He thus found Claimant had more than one year of cumulative employment with Employer, consisting of Claimant's

[8] We reject Employer's contention that employment with a prior and successor operator cannot be aggregated, as its argument is not supported by the applicable law. *See* 30 U.S.C. §932(i) (Successor operators "shall be liable for and shall. . . secure the payment of all benefits which would have been payable by the prior operator under this section with respect to miners previously employed by such prior operator as if the acquisition had not occurred and the prior operator had continued to be an operator of a coal mine."); *C & K Coal Co. v. Taylor*, 165 F.3d 254, 257 (3d Cir. 1999) (aggregating predecessor and successor operator employment to find greater than one year of employment, and holding that the prior operator would only be liable "if [the successor] could not otherwise assume liability"), *accord Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 565-66 (6th Cir. 2002) (citing *Taylor* to support "aggregating the time a miner worked for the predecessor and successor companies to determine whether his employment exceeded the one-year requirement"); Employer's Reply Brief at 8-9.

aggregated employment with Kaiser and P&M, the latter of which became Chevron Mining. *Id.* at 6.

Because it is supported by substantial evidence, we affirm the ALJ's finding Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e).

The ALJ further found Claimant's last coal mine employment was with Employer in 1993, and therefore found Employer is the potentially liable operator that most recently employed him. 20 C.F.R. §725.495(a)(1); Decision and Order at 5-6.

As Employer does not allege it is financially incapable of assuming liability for benefits, it can avoid liability only by establishing that another financially capable operator employed Claimant more recently for at least one year. *See* 20 C.F.R. §725.495(c)(1), (2). But Employer does not argue another financially capable operator employed Claimant more recently. Instead, it argues the ALJ should have found Kaiser the responsible operator because, it contends, the regulations at 20 C.F.R. §725.495(a)(2)(i)-(ii) require prior operators be held liable for benefits before successor operators are, unless the prior operator is unable to assume liability. Employer's Brief at 16-20; Employer's Reply Brief at 5-8.

Employer's reliance on 20 C.F.R. §725.495(a)(2)(i)-(ii) is misplaced. The regulation Employer relies upon states, in relevant part: "[i]*f more than one potentially liable operator may be deemed to have employed the miner most recently*," liability is assigned first to the primary operator that directed, controlled or supervised the miner, and second, to any potentially liable operator that is a successor with respect to miners the primary operator directed, controlled or supervised. 20 C.F.R. §725.495(a)(2)(i)-(ii) (emphasis added). Employer has not established that more than one potentially liable operator may be deemed to have employed Claimant most recently.[9] On the contrary, the

[9] Employer argues the ALJ erred in finding Claimant's employment with Savage Industries, Inc. and Savage Companies (Savage) from 1986 to 1990 did not constitute work as a "miner," and the ALJ therefore erred in finding Savage was not a potentially liable operator. Employer's Brief at 13-16; Employer's Reply Brief at 3-5. It further argues the ALJ should have found Savage to be the properly designated responsible operator. Employer's Brief at 13-16; Employer's Reply Brief at 3-5. But any alleged error by the ALJ would be harmless, as Claimant's employment with Savage ended prior to his employment with P&M in 1993; thus, Savage could not have employed Claimant more recently than Employer. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §725.495(a)(1); Decision and Order at 4-5.

ALJ accurately found there is no evidence a potentially liable operator employed Claimant during—or more recently than—1993, when Claimant was employed by P&M, which was then renamed Chevron Mining, i.e., Employer in this claim.[10] Decision and Order at 6.

Because Employer did not establish another potentially liable operator more recently employed Claimant, we affirm the ALJ's finding Employer is the properly designated responsible operator and is liable for benefits in this claim. 20 C.F.R. §725.495(a)(1); Decision and Order at 6.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of them precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing their usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of 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).

[10] We note Employer concedes its burden of establishing that another potentially liable operator employed Claimant more recently "could never be satisfied given that there are no more recent employers of the Claimant as a coal miner." Employer's Brief at 37.

The ALJ found Claimant established total disability based on the arterial blood gas study evidence and in consideration of the evidence as a whole.[11] Decision and Order at 17-27. Employer argues the ALJ erred. Employer's Brief at 24-35. We disagree.

Arterial Blood Gas Studies

The ALJ considered three resting arterial blood gas studies conducted on July 16, 2018, March 9, 2020, February 14, 2022, and a resting and exercise study conducted on February 15, 2022.[12] Decision and Order at 18-20. Specifically, the ALJ accurately noted the three resting studies produced qualifying[13] values, while the February 15, 2022 study produced non-qualifying values before, during, and after exercise. *Id*. at 18; Director's Exhibits 15 at 13; 17; Claimant's Exhibit 2. The ALJ found the February 14 and 15, 2022 studies to be inconclusive overall given the conflicting results of what are essentially contemporaneous studies. Decision and Order at 20. However, because the remaining studies produced qualifying values at rest, and the February 14, 2022 study produced similar qualifying results, the ALJ found the preponderance of the arterial blood gas studies supports a finding of total disability. *Id*.

Employer argues the ALJ erred by failing to consider the non-qualifying February 15, 2022 exercise blood gas study as contrary probative evidence that weighs against finding the blood gas studies overall support total disability. Employer's Brief at 24-25.

[11] The ALJ found the pulmonary function study and medical opinion evidence does not 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)(i), (iii)-(iv); Decision and Order at 16, 18, 27.

[12] We reject Employer's argument that the ALJ erred by failing to consider a May 15, 2009 arterial blood gas study conducted as part of Claimant's prior claim. Employer's Brief at 27. The ALJ considered the prior claim evidence but permissibly found the more recent evidence a more accurate reflection of Claimant's current condition. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than that submitted with a prior claim because of the progressive nature of pneumoconiosis); Decision and Order at 27.

[13] A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

Alternatively, it argues the ALJ should have assigned more weight to the February 15, 2022 exercise study over the remaining studies conducted only at rest. *Id*. at 25-28. We disagree.

The ALJ found the studies conducted on February 14 and 15, 2022 inconclusive regarding total disability as the two tests produced conflicting results, and he found no reason to assign greater weight to either study over the other. Decision and Order at 19-20. The ALJ noted that, although not in-circuit law, the United States Courts of Appeals for the Fourth and Sixth Circuits have held it is irrational to credit evidence solely on the basis of recency in situations where the later evidence demonstrates an improved condition, given the progressive and irreversible nature of pneumoconiosis.[14] Decision and Order at 18-19 (citing *Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6h Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992)).

Additionally, the ALJ noted the two studies were effectively contemporaneous, and thus rationally declined to assign greater weight to the February 15, 2022 study on account of its recency. *See Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991); Decision and Order at 19. The ALJ also permissibly declined to assign greater weight to the non-qualifying February 15 exercise study. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (it is within the ALJ's discretion to find a particular study more probative than another study, and while ALJs may give greater weight to exercise study results if warranted, they are not required to do so); 20 C.F.R. §718.105(a) (a gas exchange impairment may manifest "either at rest or during exercise"); 20 C.F.R. §718.105(b) ("If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated."); Decision and Order at 19.

As substantial evidence supports the ALJ's finding that the February 14 and February 15, 2022 blood gas studies are inconclusive as to the existence of total disability, we affirm it. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order at 20. Because Employer raises no further arguments, we affirm the ALJ's finding the blood gas study evidence overall supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 20.

Medical Opinions

[14] The Board has since issued similar holdings. *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-11 (Nov. 17, 2023), *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (June 23, 2023).

The ALJ considered Dr. Sood's opinion Claimant is totally disabled, and the contrary opinions of Drs. Tuteur and Rosenberg. Decision and Order at 20-26. He found Dr. Sood's opinion entitled to less than full probative weight, and the opinions of Drs. Rosenberg and Tuteur entitled to little or no weight. *Id.* at 27. Having found all three medical opinions "infirm," the ALJ determined the medical opinion evidence neither supports nor undermines a finding of total disability. *Id.*

Employer argues the ALJ erred in discrediting the opinions of Drs. Tuteur and Rosenberg. Employer's Brief at 28-32. We disagree.

Drs. Tuteur and Rosenberg opined Claimant has no respiratory or pulmonary impairment. Director's Exhibit 17 at 4; Employer's Exhibits 6 at 6; 7 at 16, 22. They opined Claimant's arterial blood gas studies did not demonstrate any impairment based on their calculations of Claimant's alveolar-arterial (A-a) oxygen gradient and the barometric pressures at which the blood gas studies were performed. Director's Exhibit 17 at 3-4; Employer's Exhibits 6 at 6; 7 at 12, 14-15, 19-21. Further, they opined the use of barometric pressure and the A-a gradient provides a more accurate assessment of respiratory condition than the measurements based on altitude found in the table setting forth qualifying arterial blood gas study values at Appendix C to 20 C.F.R. Part 718 of the regulations. Employer's Exhibits 6 at 6; 7 at 20-21.

The ALJ found the physicians' reliance on barometric pressure and the A-a gradient to discount Claimant's blood gas studies unpersuasive. Decision and Order at 23-26. He noted there was no consensus among Drs. Rosenberg, Tuteur, and Sood as to what a "normal" A-a gradient value would be for Claimant and found none of the physicians provided a detailed explanation of how they determined their respective interpretations of the A-a gradient values.[15] *Id.* at 23. In addition, the ALJ was not persuaded by the opinions of Drs. Tuteur and Rosenberg that the Appendix C tables, which list qualifying blood gas values based on varying altitude ranges, produce less accurate results. *Id.* at 23-26. The ALJ noted these tables already account for the effects of age and elevation, and the DOL

[15] Dr. Rosenberg identified a normal A-a gradient for a person of Claimant's age as either 22 or 23 mm Hg, and he calculated Claimant's A-a gradient values to be 21.6 mm Hg on February 14, 2022, and 17.4 mm Hg on February 15, 2022. Employer's Exhibit 6 at 6. Dr. Tuteur opined the lower limit for a normal value would be 32 mm Hg, and he calculated Claimant's A-a gradient as 13, 24, and 25 mm Hg during the May 15, 2009, July 16, 2018, and March 9, 2020 blood gas studies, respectively. Director's Exhibit 17 at 3-4; Employer's Exhibit 7 at 20-21. Dr. Sood calculated Claimant's A-a gradient as 24 and 22 mm Hg during the July 16, 2018 and February 14, 2022 blood gas studies, respectively, but opined both were abnormal gradient results. Claimant's Exhibit 2 at 7-8.

chose to use ranges of altitude as a measure because it found there is not a straightforward linear relationship between atmospheric oxygen pressure and arterial blood oxygen tension across altitudes. *Id.* at 23-24 (citing 45 Fed. Reg. 13678, 13712 (Feb. 29, 1980)).

Thus, contrary to Employer's argument, the ALJ fully considered the opinions of Drs. Tuteur and Rosenberg, and he acted within his discretion in finding their reliance on the A-a gradient unpersuasive.[16] *See N. Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Decision and Order at 23-26. We therefore affirm the ALJ's finding the medical opinion evidence neither supports nor refutes a finding of total disability.[17] Decision and Order at 27. Further, we affirm the ALJ's finding Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish he has a "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).

[16] We reject Employer's argument that the ALJ should have considered the opinions of Drs. Tuteur and Rosenberg alongside the arterial blood gas studies, rather than as medical opinion evidence. Employer's Brief at 24-25, 30. Employer has not explained how this would make a difference, particularly where, as here, the ALJ fully considered and permissibly discredited their opinions. *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*, 6 BLR at 1-1278.

[17] Employer additionally argues the ALJ erred in determining the exertional requirements of Claimant's usual coal mine work. Employer's Brief at 33-35. Thus it argues Dr. Sood's diagnosis of total disability is not credible because it is based on an inaccurate understanding of Claimant's last coal mine work. *Id*. at 32. But any error by the ALJ in this regard would be harmless because he nevertheless found Dr. Sood's opinion "infirm" and not entitled to "full probative weight"; permissibly discredited the contrary "infirm" opinions of Drs. Tuteur and Rosenberg for reasons unrelated to their consideration of the exertional requirements of Claimant's last coal mine work; found the medical opinions neither support nor refute a finding of total disability; and ultimately determined Claimant established total disability based upon the arterial blood gas studies alone. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 27.

The ALJ credited Dr. Sood's diagnosis of chronic bronchitis to which Claimant's coal mine dust exposure is a substantial contributing factor. He discredited the contrary opinions of Drs. Tuteur and Rosenberg that Claimant does not have legal pneumoconiosis. Decision and Order at 12-16. Thus, the ALJ found Claimant established the existence of legal pneumoconiosis.

Employer argues the ALJ erred in crediting Dr. Sood's opinion to the extent the physician relied upon Claimant's arterial blood gas study results, which Employer argues do not demonstrate any respiratory or pulmonary impairment. Employer's Brief at 35-36. As we have already rejected Employer's arguments concerning the arterial blood gas studies and affirmed the ALJ's finding they establish total disability, we reject Employer's argument.

We therefore affirm the ALJ's finding Claimant established the existence of legal pneumoconiosis based upon Dr. Sood's opinion. 20 C.F.R. §718.202(a). Thus, we affirm the ALJ's finding Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 16.

Disability Causation

To establish total disability due to pneumoconiosis, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

The ALJ discredited the opinions of Drs. Tuteur and Rosenberg concerning disability causation as neither physician opined Claimant has pneumoconiosis or a totally disabling respiratory impairment, contrary to the ALJ's findings. Decision and Order at 28. As Employer does not challenge the ALJ's discrediting of their opinions regarding disability causation, we affirm it. *See Skrack*, 6 BLR at 1-711; *see also Toler v. E. Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995), *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989)

Employer argues the ALJ erred in crediting Dr. Sood's opinion that Claimant's legal pneumoconiosis is a substantially contributing cause of his totally disabling impairment. Employer's Brief at 35-36. It argues Dr. Sood's opinion is legally insufficient to establish disability causation as his opinion "did not actually explain it was the miner's legal pneumoconiosis that caused his disability[.]" *Id.* We disagree.

Dr. Sood opined Claimant has simple clinical pneumoconiosis as well as legal pneumoconiosis in the form of chronic bronchitis to which Claimant's coal mine dust exposure was a substantial contributing factor. Director's Exhibit 15 at 18-19; Claimant's Exhibit 2 at 7-8. He opined Claimant's "lung diseases are substantial contributing factors to [Claimant's] respiratory impairment[,]" and identified no non-pulmonary diagnoses contributing to Claimant's impairment. Claimant's Exhibit 2 at 8.

The ALJ found Dr. Sood's reference to lung diseases meant both clinical and legal pneumoconiosis, as he accurately noted these were the "only conditions [Dr. Sood] diagnosed the Claimant as having." Decision and Order at 28. But the ALJ acknowledged Dr. Sood's opinion that Claimant has clinical pneumoconiosis is contrary to the ALJ's finding Claimant did not establish the existence of the disease. *Id*. However, he permissibly found that Dr. Sood's statement that Claimant's "lung diseases," in the plural, are substantially contributing "factors" to his respiratory impairment, indicated the doctor was opining both diseases are, individually, substantial contributing factors to Claimant's impairment. *See Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; Decision and Order at 28. We therefore see no error in the ALJ's finding Dr. Sood's opinion sufficient to establish disability causation.

As Employer raises no further argument, we affirm the ALJ's finding Claimant established his legal pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment based upon Dr. Sood's opinion. 20 C.F.R. §718.204(c). We therefore affirm the award of benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge