U.S. Department of Labor

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

BRB No. 24-0290 BLA

DAVID D. HATCHER Claimant-Respondent v. ITMANN COAL COMPANY and CONSOL ENERGY INCORPORATED c/o SMART CASUALTY CLAIMS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/23/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIUM:

Employer appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2022-BLA-05304) rendered on a subsequent claim filed on December 22, 2020,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 14.40 years of underground coal mine employment and thus found he could not invoke 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). Considering entitlement under 20 C.F.R. Part 718, he found Claimant established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b), and thus established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found that while Claimant did not establish clinical pneumoconiosis, he established the existence of legal pneumoconiosis, 20 C.F.R. §§718.201, 718.202, and that his legal pneumoconiosis substantially contributed to his total disability. 20 C.F.R. §718.204(c). Thus the ALJ awarded benefits.

[1] On May 5, 2016, the district director denied Claimant's previous claim, filed on May 13, 2015, for failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[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 "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(d); *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(d)(2). Because the district director denied Claimant's previous claim for failure to establish total disability, he had to submit new evidence establishing this element of entitlement to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3.

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[4] Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs, has declined to file a response unless specifically requested.

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 Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis 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 the elements 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).

To establish legal pneumoconiosis, Claimant must prove he has 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(b), 718.202(a)(4).

The ALJ considered the opinions of Drs. Habre, Green, Zaldivar, and Basheda. Decision and Order at 43-45. Drs. Habre and Green opined Claimant has legal pneumoconiosis in the form of chronic bronchitis and chronic obstructive pulmonary disease (COPD) due to the effects of smoking and coal mine dust exposure, and that coal

[4] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established 14.40 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and thereby established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §725.309(c); Decision and Order 12-13, 37-38.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 30-31.

mine dust exposure played a "substantial" role. Director's Exhibit 11 at 4; Claimant's Exhibits 1 at 3; 2 at 5; Employer's Exhibits 1 at 14; 7 at 12. Drs. Zaldivar and Basheda opined Claimant has an obstructive impairment caused by smoking and does not have legal pneumoconiosis. Employer's Exhibits 5 at 25; 8 at 33. The ALJ discredited the opinions of Drs. Zaldivar and Basheda as inadequately reasoned. Decision and Order at 44-45. He found the opinions of Drs. Green and Habre reasoned and documented, although he gave less weight to Dr. Habre's opinion because it is unclear whether the physician considered an accurate smoking history. Decision and Order at 43. He concluded the opinions of Drs. Green and Habre are better reasoned than the opinions of Drs. Zaldivar and Basheda, and therefore found Claimant established legal pneumoconiosis. *Id*. at 43-46.

Employer argues the ALJ failed to adequately consider the conflicting evidence regarding Claimant's smoking history and render a finding on its length. Employer's Brief at 6-14. We disagree.

The ALJ considered Claimant's hearing testimony that he began smoking in his twenties, starting with a half-pack to full pack per day for approximately ten years, but that he only smoked approximately a quarter-pack per day for the last ten years. Decision and Order at 5-6; Hearing Tr. at 30, 33-34. Employer's counsel informed Claimant that his treatment records from Drs. Miller and Porterfield indicated Claimant smoked approximately one pack per day for at least fifty years and continued to be a pack-per-day smoker. Hearing Tr. at 35-38. Claimant stated he had no reason to dispute the physicians' records, but he did not recall telling them that he smoked at that rate and maintained he had only been a pack-per-day smoker when he began smoking. *Id*.

Dr. Habre recorded that Claimant smoked a quarter-pack per day since 1969, resulting in a 15.25 pack-year history at the time of his supplemental report. Director's Exhibit 11 at 4; Claimant's Exhibit 1 at 1. He also testified at his deposition that it was possible Claimant was smoking a pack of cigarettes per day at that time based on his carboxyhemoglobin levels and because he had a long smoking history. Employer's Exhibit 1 at 14-15, 20. Dr. Green reported Claimant currently smokes and has done so over the last fifty-five years, averaging one pack per day or less. Claimant's Exhibit 2 at 3; Employer's Exhibit 7 at 10-11.

Dr. Zaldivar reported Claimant "thinks he began smoking at age [twenty]" and smoked a half-pack per day in the past but currently smokes only one quarter-pack daily. Director's Exhibit 21 at 9. However, he opined Claimant was a pack-per-day smoker based on his elevated carboxyhemoglobin levels measured on the day of his examination. Director's Exhibit 21 at 5; Employer's Exhibit 6 at 12. Dr. Basheda stated Claimant smoked less than a pack per day from his teens to age sixty-nine, and his carboxyhemoglobin levels indicated he was still smoking, although he could not

"quantitate how much [Claimant] smoked." Employer's Exhibits 5 at 4, 21, 23; 8 at 8-9. He further opined Claimant has a significant smoking history because he smoked more than ten pack years. Employer's Exhibits 5 at 21; 8 at 8-9.

After discussing all the various recorded smoking histories, the ALJ gave more weight to those from Drs. Miller, Porterfield, Green, and Basheda, as well as the carboxyhemoglobin measurements discussed by Dr. Zaldivar, as they are all consistent with each other. Decision and Order at 6. Thus, contrary to Employer's argument, the ALJ considered the relevant evidence, noted the full range of smoking histories, and made a reasonable finding, supported by substantial evidence, that Claimant had a substantial smoking history of at least fifty pack-years.[6] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985) (ALJ is responsible for making a factual determination as to the length and extent of a miner's smoking history); Decision and Order at 6.

Employer next asserts the ALJ erred in discrediting the opinions of Drs. Zaldivar and Basheda. Employer's Brief at 22-25. We disagree.

Both Drs. Zaldivar and Basheda excluded coal mine dust exposure as a contributor to Claimant's obstructive impairment because he "developed progressive respiratory symptoms . . . long after leaving the coal mines." Employer's Exhibits 5 at 23; 6 at 27-28. The ALJ permissibly discredited their opinions as inconsistent with the regulation recognizing that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *see also, e.g., Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012) (ALJ permissibly discredited physician's opinion that miner's disease did not constitute legal pneumoconiosis because physician relied in part on the "impermissible factor" of the amount of time between

[6] Employer argues it was necessary for the ALJ to make a specific finding that Claimant's testimony regarding his smoking history is not credible, and that the ALJ should have considered a "penalty for [Claimant] making a false statement to the agency in pursuit of benefits." Employer's Brief at 6-11. Because the ALJ did not rely on Claimant's testimony in finding he has a fifty pack-year smoking history, we need not address these arguments. *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").

cessation of the miner's coal mine employment and current condition); Decision and Order at 45.

Additionally, Dr. Zaldivar opined Claimant's obstructive impairment is caused by tobacco and biomass smoke and not coal mine dust exposure because his chest x-rays demonstrate minimal or no dust deposition. Director's Exhibit 21 at 7; Employer's Exhibit 6 at 27-28. He also opined Claimant's obstructive impairment is not due to coal mine dust exposure because it was caused by the pollutants he was exposed to when he worked as a toll collector in West Virginia. Employer's Exhibit 6 at 26-28.

The ALJ permissibly further found Dr. Zaldivar's opinion unpersuasive because it is inconsistent with the regulations, which recognize that legal pneumoconiosis can exist in the absence of positive x-ray evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (the regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that '[n]o claim for benefits shall be denied solely on the basis of a negative chest [x]-ray'"); 20 C.F.R. §718.202(b); *see also* 65 Fed. Reg. at 79,945; Decision and Order at 45. He also permissibly found Dr. Zaldivar's opinion that automotive pollutant exposures caused or contributed to Claimant's obstruction inadequately reasoned because Dr. Zaldivar had no information from which to estimate the extent of Claimant's exposures to automotive pollutants.[7] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 44.

Because the ALJ provided valid reasons for discrediting the opinions of Drs. Zaldivar and Basheda, we decline to consider Employer's remaining arguments concerning the ALJ's weighing of their opinions on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 22-25.

Employer also argues the ALJ erred in crediting Dr. Green's opinion.[8] Employer's Brief at 17-22. We disagree.

[7] While Employer submitted a report titled *Task Force on Health Effects of Toll Plaza Air Quality in New York City: Report to the Governor and Legislature* from the New York State Department of Health, the ALJ found the study "lacks any probative value regarding the environmental exposure" Claimant would have experienced working as a toll collector in West Virginia. Decision and Order at 44; Employer's Exhibit 9.

[8] To the extent Employer argues Dr. Green's opinion is not credible because he failed to consider Claimant's work as a toll booth operator as another "potential risk for COPD," we disagree. Employer's Brief at 19-20. As Employer acknowledges, Dr. Green discussed Claimant's work as a toll booth operator and opined it is unlikely he was

Dr. Green diagnosed Claimant with legal pneumoconiosis in the form of COPD due to smoking and the substantial effects of coal mine dust exposure based upon his symptoms, the persistent and reproducible obstruction and air trapping seen on his pulmonary function studies, the impaired gas exchange demonstrated by exercise blood gas studies, and several medical studies. Claimant's Exhibit 2 at 5-13. He observed Claimant has a fifty-five-year smoking history, and that his coal mine employment operating miners at the mine face would have resulted in heavy coal and rock dust exposure. *Id*. at 3-4. Considering Claimant's significant exposure histories, he opined Claimant's COPD arose from "his occupational exposure in addition to [his] exposure to longstanding cigarette smoking." *Id.* at 11-14; Employer's Exhibit 7 at 10-13, 20-21.

Contrary to Employer's contention, the ALJ permissibly found Dr. Green persuasively and thoroughly explained how Claimant's smoking history and heavy coal mine dust exposure from fourteen years of underground coal mine employment at the mine face were additive and both significantly contributed to Claimant's COPD, consistent with the preamble to the revised 2001 regulations and medical studies he referenced.[9] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 667 (4th Cir. 2017); *Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-33 (4th Cir. 2013) (affirming ALJ's reliance on physician's opinion – that both smoking and coal dust exposure not only could have but affirmatively did cause miner's respiratory impairment – as constituting substantial evidence of legal pneumoconiosis); *Looney*, 678 F.3d at 314; *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006) (physician need not apportion a specific percentage of a miner's lung disease to cigarette smoke versus coal mine dust exposure to establish the existence of legal pneumoconiosis); 65 Fed. Reg. at 79,940; *see also Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 43.

"exposed to any hazards while collecting tolls on the turnpike that might lead to obstructive airways disease." *Id.*, citing Employer's Exhibit 7 at 9.

[9] Thus this case is distinguishable from *American Energy, LLC v. Director, OWCP* [*Goode*], 106 F.4th 319 (4th Cir. 2024), where "the only reason the ALJ gave for finding [the claimant's] experts' legal pneumoconiosis opinions more persuasive was that they were consistent with the preamble because they attributed [the miner's] impairment to both smoking and coal dust." *Goode*, 106 F.4th at 333 (ALJ can find a physician's opinion more persuasive based on their more thorough analysis of the potential causes of the miner's pulmonary or respiratory impairment); Employer's Brief at 21-22.

Finally, Employer argues the ALJ did not explain with sufficient specificity how much weight he gave to Dr. Habre's opinion, and that the opinion should be given no weight as it relies on an inaccurate smoking history. Employer's Brief at 13-17, 22.

Similar to Dr. Green, Dr. Habre opined Claimant's "significant" smoking history and coal mine dust exposure from fourteen years of coal mining employment both substantially contributed to his chronic bronchitis and airway disease. Director's Exhibit 11 at 4-5; Claimant's Exhibit 1 at 3; Employer's Exhibit 1 at 12-14, 20-21. He explained that Claimant was exposed to a higher dust burden and an increased risk of chronic bronchitis working at the mine face and that there were higher dust limits when Claimant was working in the mines from 1970 until 1985, leading to greater exposure to coal dust and incidence of coal-dust-induced disease. Claimant's Exhibit 1 at 3; Employer's Exhibit 1 at 21-22. Dr. Habre stated Claimant has been smoking a quarter pack a day since 1969, and thus had a 15.25 pack-year smoking history at the time of his report, that he continues to smoke, and that it would be reasonable to conclude he smoked one pack of cigarettes per day based on his carboxyhemoglobin levels. Claimant's Exhibit 1 at 2; Employer's Exhibit 1 at 14-15.

The ALJ permissibly found Dr. Habre's explanation that both smoking and coal mine dust exposure caused Claimant's chronic bronchitis to be credible for the same reasons he found Dr. Green's opinion is reasoned. *See Stallard*, 876 F.3d at 667; *Cochran*, 718 F.3d at 322-33; *Looney*, 678 F.3d at 314; *Williams*, 453 F.3d at 622; Decision and Order at 43. He further found Dr. Habre's opinion is entitled to less probative weight, however, because "it is unclear whether he has accounted for Claimant's [fifty]-plus years of smoking at the rate of one pack per day" and he "underestimate[d] Claimant's cigarette smoking history." Decision and Order at 43. He also found "it is apparent that [Dr. Habre] understood the elevated carboxyhemoglobin levels measured in his evaluations as well as those measured by the other physicians in this case" and thus credited Dr. Habre's opinion "to some extent." *Id.* at 43, 45.

While we agree with Employer that the ALJ's findings regarding Dr. Habre's opinion are not entirely clear, any error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 16-17. Regardless of the weight the ALJ gave Dr. Habre's opinion, it supports Dr. Green's opinion, which the ALJ gave "full credit." Decision and Order at 43. Because the ALJ found Dr. Green's opinion outweighs the opinions of Drs. Zaldivar and Basheda, we need not address Employer's arguments regarding the weighing of Dr. Habre's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni*, 6 BLR at 1-1278; Decision and Order at 43-45; Employer's Brief at 13-17.

Because the ALJ acted within his discretion in weighing the medical opinions, we affirm his finding that Claimant established legal pneumoconiosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; 20 C.F.R. §§718.201(b), 718.202(a); Decision and Order at 43-46. As Employer raises no further arguments, we also affirm the ALJ's unchallenged finding that Claimant established his pneumoconiosis arose out of his coal mine employment and that he was totally disabled due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.203, 718.204(c); Decision and Order at 46.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge