



BRB Nos. 21-0028 BLA
and 21-0053 BLA

PATRICIA MILLS)
(o/b/o and Widow of STANLEY D. MILLS))

Claimant-Respondent)

v.)

P A L COAL, INCORPORATED)

and)

DATE ISSUED: 12/21/2021

WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeals of the Decision and Order on Remand Awarding Benefits of Monica C. Markley and the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judges, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica C. Markley's Decision and Order on Remand Awarding Benefits (2013-BLA-05472) and ALJ Steven D. Bell's Decision and Order Awarding Benefits (2018-BLA-05321) rendered on claims filed pursuant to Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹ This case involves a miner's claim filed on February 3, 2012 and a survivor's claim filed on August 8, 2017. Both claims are before the Board for the second time.²

In a July 20, 2017 Decision and Order – Awarding Benefits issued in the miner's claim, ALJ Alan L. Bergstrom credited the Miner with 7.86 years of coal mine employment and therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).³ Considering entitlement under 20 C.F.R. Part 718, he found Claimant established the Miner had clinical⁴ and legal⁵ pneumoconiosis, and a totally disabling respiratory or pulmonary

¹ Employer's appeal in the miner's claim was assigned BRB No. 21-0028 BLA, and its appeal in the survivor's claim was assigned BRB No. 21-0053 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

² Claimant is the widow of the Miner, who died on November 27, 2015, while his claim was pending before ALJ Alan L. Bergstrom. Director's Exhibit 10; Claimant's Exhibit 6. In addition to pursuing the miner's claim on behalf of his estate, she is also pursuing her claim for survivor's benefits. Claimant's Brief at 2-3.

³ 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.

⁴ "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).

⁵ "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

impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c). He therefore awarded benefits.

Thereafter Claimant filed her survivor's claim. In a March 2, 2018 Decision and Order Granting Claimant's Motion for Summary Decision, ALJ John P. Sellers, III, found her automatically entitled to survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l), based on the award of benefits in the Miner's claim.⁶

Employer appealed, and Claimant cross-appealed, ALJ Bergstrom's award of benefits in the miner's claim. The Board affirmed his findings that Employer is the responsible operator and the Miner was totally disabled. 20 C.F.R. §718.204(b)(2). But the Board vacated his determinations that the Miner had clinical and legal pneumoconiosis and was totally disabled due to pneumoconiosis. Thus it vacated the award in the miner's claim and remanded the case for further consideration. *See Mills v. PAL Coal, Inc.*, BRB Nos. 17-0601 BLA and 17-0601 BLA-A (Sept. 27, 2018) (unpub.).

After the Board vacated the award of benefits in the Miner's claim, Employer filed a motion to vacate and remand the derivative survivor's award. The Board agreed and vacated ALJ Sellers's award. The Board stated that if the Miner's benefits are reinstated on remand, the award of survivor's benefits under Section 422(l) also must be reinstated. *Mills v. PAL Coal, Inc.*, BRB No. 18-0268 (May 21, 2019) (unpub.); *see Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014).

Thereafter the Miner's claim was reassigned to ALJ Markley because ALJ Bergstrom was unavailable to further adjudicate it.

In her Decision and Order on Remand Awarding Benefits dated September 22, 2020, the subject of the current appeal, ALJ Markley found Claimant established the Miner had clinical and legal pneumoconiosis and was totally disabled due to legal pneumoconiosis. Thus she awarded benefits in the miner's claim.

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).

⁶ Section 422(l) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

Similarly, the survivor's claim was reassigned to ALJ Bell because ALJ Sellers was unavailable to further adjudicate it.

In his Decision and Order Awarding Benefits dated October 1, 2020, the subject of the current appeal in the survivor's claim, ALJ Bell found Claimant automatically entitled to survivor's benefits under Section 422(l), 30 U.S.C. §932(l), because ALJ Markley reinstated the Miner's award of benefits.

On appeal, Employer argues ALJ Markley (the ALJ) erred in finding Claimant established the Miner had legal pneumoconiosis and was totally disabled due to pneumoconiosis.⁷ Based on the errors alleged in the miner's claim, Employer further contends ALJ Bell's award of benefits in the survivor's claim should be vacated. Claimant responds in support of the awards. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJs' Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.⁸ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Miner's Claim - 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).

⁷ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Miner Decision and Order on Remand at 4-6.

⁸ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had a chronic lung disease or an impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(2), (b).

The ALJ considered the medical opinions of Drs. Cohen and Rasmussen that the Miner had legal pneumoconiosis in the form of totally disabling chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking.⁹ Miner Decision and Order on Remand at 6-8; Director’s Exhibit 12; Employer’s Exhibit 1; Claimant’s Exhibits 4, 7. She found Drs. Cohen’s and Rasmussen’s opinions well-reasoned and documented. Miner Decision and Order on Remand at 8. She therefore found the medical opinion evidence establishes the Miner had legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Miner Decision and Order on Remand at 8.

Initially, we reject Employer’s argument that the ALJ applied an incorrect legal standard in weighing Drs. Cohen’s and Rasmussen’s opinions because she required only that they conclude coal mine dust exposure contributed in part to the Miner’s disabling obstructive impairment. Employer’s Brief at 9-12. The United States Court of Appeals for the Sixth Circuit, whose law applies to this case, holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure “by showing that his disease was caused ‘in part’ by coal mine employment.” *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) (“[I]n [*Groves*] we defined ‘in part’ to mean ‘more than a *de minimis* contribution’ and instead ‘a contributing cause of some discernible consequence.’”). Thus the ALJ applied the correct standard in finding Drs. Cohen’s and Rasmussen’s opinions

⁹ The record also contains the medical opinions of Drs. Castle and Rosenberg. They opined the Miner suffered from chronic obstructive pulmonary disease (COPD)/emphysema, but attributed the disease solely to cigarette smoking. Director’s Exhibit 13; Employer’s Exhibits 5, 9, 10. The Board affirmed ALJ Bergstrom’s discrediting of their medical opinions. *See Mills v. PAL Coal, Inc.*, BRB Nos. 17-0601 and 17-0601 BLA-A (Sept. 27, 2018) (unpub.). Consequently, the ALJ did not separately address the medical opinions of Drs. Castle and Rosenberg at 20 C.F.R. §718.202(a)(4). However, the ALJ weighed the medical opinion evidence as a whole to determine whether it establishes the presence of legal pneumoconiosis. Miner Decision and Order on Remand at 6, 8.

sufficient to establish legal pneumoconiosis.¹⁰ Miner Decision and Order on Remand at 8; *see Groves*, 761 F.3d at 598-99; *see also Young*, 947 F.3d at 407.

We also reject Employer's argument that the ALJ erred in crediting Drs. Cohen's and Rasmussen's opinions.¹¹ Employer's Brief at 12-15. The ALJ permissibly found their opinions attributing the Miner's COPD/emphysema to both his coal mine dust exposure and cigarette smoking well-reasoned and documented because they are based on clinical findings, objective medical evidence, medical literature, and a "full picture" of the Miner's occupational and social history.¹² Miner Decision and Order on Remand at 8; *see Groves*,

¹⁰ Dr. Rasmussen considered the Miner's description of his coal mine employment in his CM-913 form and noted all of the Miner's coal dust exposure was at the face in underground mining and that coal mine dust exposure results in the progressive deterioration of lung function even after exposure ends. Director's Exhibit 12. He opined the Miner's COPD/emphysema was caused in part by coal mine dust exposure, which significantly contributed to his disabling chronic lung disease. *Id.* Dr. Cohen also considered the Miner's description of his coal mine employment in his CM-913 form and determined he worked in very dusty and very low coal with no dust suppression. Claimant's Exhibit 7 at 19-22. He opined the Miner's coal mine dust exposure was a significant contributor to his COPD. *Id.* at 16, 19-22.

¹¹ Employer additionally argues the ALJ failed to recognize that Dr. Cohen's report is equivocal as he indicated the Miner's coal mine dust exposure might be a significant factor to his lung disease. Employer's Brief at 14. Contrary to Employer's contention, the ALJ acknowledged Dr. Cohen's statement, in response to a question by Employer's counsel, that "it was a significant possibility that [the Miner] would have had disabling COPD even if he never worked in the coal mines," but acted within her discretion in finding his opinion well-reasoned and supports a finding of legal pneumoconiosis. Miner's Decision and Order on Remand at 7-8; *see Claimant's Exhibit 7 at 25-26; Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000). We therefore reject Employer's argument.

¹² Employer also argues Dr. Rasmussen relied on an "underreported" smoking history. Employer's Brief at 12. In a March 20, 2012 report, Dr. Rasmussen noted the Miner had a cigarette smoking history of approximately twenty-nine years. Director's Exhibit 12. At a subsequent deposition, Dr. Rasmussen testified that even if the Miner had an 80-pack-year cigarette smoking history, he would not disregard the Miner's coal mine dust exposure as a contributing factor to his disabling pulmonary impairment. Claimant's Exhibit 4 at 36-37. As the ALJ noted, Dr. Rasmussen opined both the Miner's coal dust exposure and smoking history contributed to his pulmonary impairment. Miner's Decision and Order on Remand at 7; Director's Exhibit 12; Exhibit 4 at 36-37. Thus Employer has

761 F.3d at 598-99; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Miner Decision and Order on Remand at 7-8. She further permissibly found their opinions consistent with the Department of Labor's recognition that the effects of smoking and coal dust exposure can be additive. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); *Energy W. Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Miner Decision and Order on Remand at 8.

We further reject Employer's argument that the ALJ erred in crediting Drs. Cohen's and Rasmussen's opinions because they failed to quantify the specific effects of cigarette smoking from those of coal mine dust exposure. Employer's Brief at 13, 14. A physician need not apportion a specific percentage of a miner's lung disease or impairment to coal mine dust exposure as opposed to cigarette smoke to establish the existence of legal pneumoconiosis. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). The physician need only credibly diagnose the disease or impairment as "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." See 20 C.F.R. §718.201(b); see *Groves*, 761 F.3d at 598-99. Here, as discussed above, the ALJ permissibly credited the opinions of Drs. Cohen and Rasmussen that the Miner's disabling respiratory impairment was significantly related to his coal mine dust exposure.

We also reject Employer's argument that the ALJ erred in crediting Dr. Rasmussen's opinion because he relied on his own testing to reach his conclusions and did not have the opportunity to consider the most recent medical records regarding the Miner's lung cancer diagnosis. Employer's Brief at 12-13. An ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner, objective test results, and exposure histories. See *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). Employer's arguments on legal pneumoconiosis are a request for the Board to

not shown why the alleged error requires remand. 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 v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

Because the ALJ acted within her discretion in rendering her credibility findings, and they are supported by substantial evidence, we affirm her determination that Claimant established the Miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 22.

Disability Causation

To establish a miner was totally disabled due to pneumoconiosis, Claimant must prove pneumoconiosis was a “substantially contributing cause” of the miner’s totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis was a substantially contributing cause of a miner’s totally disabling impairment if it had “a material adverse effect on the miner’s respiratory or pulmonary condition” or “[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] caused by a disease or exposure unrelated to coal mine employment.” 20 C.F.R. §718.204(c)(1)(i), (ii). Employer argues the ALJ’s errors in weighing the medical opinion evidence on the existence of legal pneumoconiosis apply to her findings on disability causation as she combined the two issues. Employer’s Brief at 15-16; *see* 20 C.F.R. §718.204(c); Miner Decision and Order on Remand at 8. It therefore contends a separate analysis is required to determine if legal pneumoconiosis substantially contributed to the Miner’s totally disabling respiratory impairment. *Id.*

Drs. Cohen and Rasmussen opined the Miner was totally disabled by COPD. Director’s Exhibit 12; Employer’s Exhibit 1; Claimant’s Exhibits 4, 7. As discussed above, the ALJ permissibly relied on their opinions to find this disabling impairment constituted legal pneumoconiosis. Miner Decision and Order on Remand at 8. We therefore see no error in her finding that the Miner’s legal pneumoconiosis was a substantially contributing cause of his total disability. *See Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Miner Decision and Order on Remand at 8.

As substantial evidence supports the ALJ’s finding that Drs. Cohen’s and Rasmussen’s opinions are well-reasoned, and because they establish legal pneumoconiosis substantially contributed to the Miner’s disability, we affirm her finding of disability causation pursuant to 20 C.F.R. §718.204(c). We therefore affirm the award of benefits in the miner’s claim.

Survivor's Claim

ALJ Bell determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(*l*); Survivor Decision and Order on Remand at 3. Because we have affirmed the award of benefits in the Miner's claim and Employer raises no specific challenge to the award of benefits in the survivor's claim, we affirm it. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, ALJ Markley's Decision and Order on Remand Awarding Benefits in the Miner's claim and ALJ Bell's Decision and Order Awarding Benefits in the survivor's claim are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge