



BRB No. 20-0125 BLA

FRANCIS GENTILE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 02/25/2021
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for Claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-05032) rendered on a claim filed on August 13, 2015 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 10.72 years of coal mine employment, and thus found he could not invoke the rebuttable presumption of total

disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2018).¹ Considering entitlement under 20 C.F.R. Part 718, she found Claimant established legal pneumoconiosis in the form of obstructive lung disease significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §718.202(a). She further found Claimant totally disabled due to the disease. 20 C.F.R. §718.204(b)(2), (c). Thus she awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding legal pneumoconiosis and total disability due to pneumoconiosis.² Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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).

¹ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

² We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established 10.72 years of coal mine employment and total disability. 20 C.F.R. §718.204(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 8-11.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant's coal mine employment occurred in Pennsylvania. *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 demonstrate 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).

Drs. Sood and Krefft diagnosed Claimant with chronic obstructive pulmonary disease (COPD) and emphysema. Claimant’s Exhibits 1, 2. They opined the respiratory impairments were caused by a combination of cigarette smoking and coal mine dust exposure, and thus Claimant has legal pneumoconiosis. *Id.* The administrative law judge found their opinions on the etiology of Claimant’s obstructive impairments well-reasoned and documented and entitled to greater weight.⁴ Decision and Order at 23-24. In contrast, Drs. Basheda and Rosenberg diagnosed COPD caused by cigarette smoking and unrelated to coal mine dust exposure. Employer’s Exhibits 5, 7, 9. The administrative law judge found their opinion inadequately reasoned, and thus entitled to reduced weight. Decision and Order at 24-25. Therefore she found Claimant established legal pneumoconiosis based on the opinions of Drs. Sood and Krefft.⁵

Employer first asserts the administrative law judge erred in discrediting Dr. Basheda’s opinion. Employer’s Brief at 6-7. We disagree. Dr. Basheda relied on the partial reversibility of Claimant’s obstructive impairment after the administration of a bronchodilator as a basis to exclude coal mine dust exposure as a cause of the COPD. Employer’s Exhibit 5. The administrative law judge permissibly found Dr. Basheda did not adequately explain why this pattern necessarily eliminated coal mine dust exposure as a contributing factor for the irreversible portion of the impairment that remained even after bronchodilators were administered. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App’x 227, 237 (4th Cir. 2004); Decision and Order at 24-25. Further, in light of the Department of Labor’s recognition that the effects

⁴ Although Dr. Sood also diagnosed lung cancer and opined the disease was caused in part by coal mine dust exposure, the administrative law judge found this aspect of his opinion inadequately reasoned. Decision and Order at 23.

⁵ Dr. Celko also diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease caused by cigarette smoking and aggravated by coal mine dust exposure. Director’s Exhibit 10. The administrative law judge assigned his opinion less weight because the doctor relied on an inflated coal mine employment history and did not adequately explain his opinion. Decision and Order at 23-24. Thus contrary to Employer’s argument, the administrative law judge did not find Claimant established legal pneumoconiosis based on Dr. Celko’s opinion. Employer’s Brief at 8.

of smoking and coal mine dust can be additive, the administrative law judge permissibly found Dr. Basheda failed to adequately explain why Claimant's history of coal mine dust exposure did not significantly contribute, along with his cigarette smoking, to his COPD/emphysema. *See* 20 C.F.R. §718.201(b); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257 (3d Cir. 2011); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 24-25.

Employer next argues the administrative law judge mischaracterized Dr. Rosenberg's opinion. Employer's Brief at 7-8. We disagree. She correctly found Dr. Rosenberg opined Claimant's COPD is due to cigarette smoking and unrelated to coal mine dust exposure because pulmonary function testing revealed a reduced FEV1/FVC ratio, which is not a pattern of impairment consistent with legal pneumoconiosis. Decision and Order at 24-25; Employer's Exhibit 7. The administrative law judge permissibly found this rationale conflicts with the medical science set forth in the preamble that "coal miners have an increased risk of developing COPD," and that COPD "may be detected from decrements in certain measures of lung function," including "the ratio of FEV1/FVC." 65 Fed. Reg. 79,920, 79,943; *see Obush*, 650 F.3d at 257; *Stallard*, 876 F.3d at 671-72; *Central Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491-92 (6th Cir. 2014); Decision and Order at 24-25. Dr. Rosenberg also cited recent studies establishing the significant adverse effects of cigarette smoking on the lungs to exclude legal pneumoconiosis. Employer's Exhibit 7. The administrative law judge permissibly found this reasoning does not address why coal mine dust exposure could not have contributed to the cigarette smoke-induced COPD. *See* 20 C.F.R. §718.201(b); *Balsavage*, 295 F.3d at 396; Decision and Order at 25.

We also reject Employer's arguments with respect to Drs. Sood and Krefft. Employer's Brief at 8-9. Employer contends Dr. Sood's opinion is legally insufficient to establish legal pneumoconiosis because the doctor indicated it was not possible to assign a specific causal percentage when distinguishing between respiratory impairments caused by smoking and coal dust exposure. *Id.* Contrary to employer's argument, a physician need not apportion a specific percentage of a miner's lung disease or impairment to cigarette smoke as opposed to coal mine dust exposure to establish the existence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them).

Moreover, the administrative law judge noted Dr. Sood based his legal pneumoconiosis diagnosis on Claimant's "symptoms, diagnoses of COPD in treatment records, objective testing showing severe obstructive lung disease, CT scan showing

emphysema, and work and smoking histories.” *Id.* She concluded he “provided thorough explanations of each aspect of his opinion and supported it with medical literature.” *Id.* Contrary to Employer’s argument, the administrative law judge permissibly found Dr. Sood’s opinion reasoned and documented. *Balsavage*, 295 F.3d at 396; *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); Decision and Order at 23.

Employer further argues the administrative law judge should have rejected Dr. Krefft’s opinion because it alleges the doctor overestimated the length of Claimant’s coal mine employment. Employer’s Brief at 9. Contrary to Employer’s argument, Dr. Krefft noted Claimant worked in coal mine employment between ten and twelve years, which is consistent with the administrative law judge’s finding that he worked in coal mines for 10.72 years. Decision and Order at 5; Claimant’s Exhibits 12, 12a.

In weighing Dr. Krefft’s opinion, the administrative law judge noted she “considered the x-ray and CT scans showing emphysema, [pulmonary function and arterial blood gas studies], medical literature, and [Claimant’s] other medical conditions, including stage 1 lung cancer with lung wedge resection.” Decision and Order at 24. She found Dr. Krefft “addressed [Claimant’s] co-morbid conditions and considered testing, symptoms, [and] work and smoking histories in her opinion.” *Id.* Finally the administrative law judge found Dr. Krefft “explained how the data supports the conclusion that Claimant suffered from legal pneumoconiosis.” *Id.* Contrary to Employer’s argument, the administrative law judge permissibly found Dr. Krefft’s opinion reasoned and documented.⁶ *Balsavage*, 295 F.3d at 396; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 24.

Employer generally argues the administrative law judge should have found the opinions of Drs. Basheda and Rosenberg well-reasoned, and discredited the opinions of Drs. Sood and Krefft. Employer’s Brief at 6-18. But it is the administrative law judge’s function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Looney*, 678 F.3d at 316-17. Employer’s arguments regarding the physicians’ opinions are

⁶ We do not find merit in Employer’s argument that the administrative law judge should have discredited Dr. Krefft’s opinion on the issue of legal pneumoconiosis because she found the x-ray and CT scan evidence in equipoise on the issue of clinical pneumoconiosis. *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 no claim for benefits shall be denied solely on the basis of a negative chest x-ray”) (internal quotations omitted); 20 C.F.R. §718.201(a)(2); Employer’s Brief at 9-10.

a request that the Board reweigh the evidence, which we are not empowered to do.⁷ *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge's finding that Claimant established legal pneumoconiosis is rational and supported by substantial evidence, we affirm it. 20 C.F.R. §718.202(a)(4); Decision and Order at 25.

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 administrative law judge weighed the opinions of Drs. Sood, Krefft, Basheda, and Rosenberg on the cause of Claimant's total disability.⁸ Decision and Order at 29-30. Drs. Basheda and Rosenberg opined Claimant's total disability is unrelated to legal pneumoconiosis. Employer's Exhibits 5, 7. The administrative law judge permissibly discounted their opinions because they did not diagnose legal pneumoconiosis. *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015).

Drs. Sood and Krefft attributed Claimant's disabling lung disease to legal pneumoconiosis in the form of COPD and emphysema. Claimant's Exhibits 10, 10a, 12, 12a. Both physicians opined Claimant's stage 1 lung cancer would not have significantly affected his lungs insofar as it was in the early stages of the disease. *Id.* The administrative law judge found the doctors "provided explanations that addressed Claimant's other potential contributing factors" for his disability. Decision and Order at 30. Contrary to Employer's argument, the administrative law judge permissibly found the opinions of Drs. Sood and Krefft well-reasoned on the issue of disability causation. *Balsavage*, 295 F.3d at

⁷ Contrary to Employer's argument, the administrative law judge properly considered Claimant's medical treatment records. Employer's Brief at 13-14. She permissibly found the records "list diagnoses including COPD, emphysema, and lung cancer," but "reflect no 'reasoned' diagnosis because they do not address whether Claimant's conditions arose, in part, out of coal mine dust exposure." Decision and Order at 28; *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002).

⁸ The administrative law judge assigned diminished weight to Dr. Celko's opinion that Claimant's total disability is due to legal pneumoconiosis. Decision and Order at 30.

396; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 30. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established total disability due to legal pneumoconiosis and entitlement to benefits. 20 C.F.R. §718.204(c); Decision and Order at 30.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge