



BRB No. 21-0421 BLA

ERNEST L. NELSON, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DAY, LLC)	
)	
and)	
)	
ENCOVA INSURANCE (formerly)	DATE ISSUED: 02/09/2023
BRICKSTREET MUTUAL INSURANCE)	
COMPANY))	
)	
Employer/Carrier-)	
Petitioners)	
)	
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 on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly¹ (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

¹ Jeffrey R. Soukup filed Employer’s and its Carrier’s Petition for Review and Brief, but Employer and its Carrier filed a notice of substitution of counsel because Mr. Soukup is no longer with Jackson Kelly PLLC.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2017-BLA-05680) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on August 15, 2014,² and is before the Benefits Review Board for a second time.

In his initial 2018 Decision and Order Awarding Benefits, the ALJ found Claimant established 15.08 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment.³ 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement⁴ and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.⁵

² On November 18, 2009, the district director denied Claimant's prior claim, filed on March 23, 2009, because he failed to establish any element of entitlement. Employer's Exhibit 1.

³ The ALJ found Claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304; 2018 Decision and Order at 53.

⁴ Where 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 she 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)(1); *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 any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id.*

⁵ 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.

30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits commencing August 2014.

Considering Employer's appeal, the Board affirmed the ALJ's finding that Claimant established total disability and a change in an applicable condition of entitlement. *Nelson v. Day, LLC*, BRB No. 19-0018 BLA, slip op. at 3 n.4 (Nov. 25, 2019) (unpub.); see 20 C.F.R. §§718.204(b)(2), 725.309(c); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). However, the Board vacated his finding that Claimant established 15.08 years of underground coal mine employment because he summarily accepted the district director's calculation and did not explain the basis for his finding. *Nelson*, BRB No. 19-0018 BLA, slip op. at 3-5. Thus the Board vacated the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. *Id.* at 5. The Board further vacated the ALJ's commencement date finding because he incorrectly stated the date Claimant filed this claim. *Id.* at 6 n.10. Consequently, the Board remanded this case for further consideration of these issues.⁶

On remand, the ALJ credited Claimant with thirteen years, ten months, and twenty days of coal mine employment and therefore found he could not invoke the Section 411(c)(4) presumption.⁷ Considering entitlement under 20 C.F.R. Part 718, he found Claimant established clinical pneumoconiosis,⁸ legal pneumoconiosis,⁹ and a totally

⁶ Because it vacated the ALJ's findings that Claimant established 15.08 years of underground coal mine employment and invoked the Section 411(c)(4) presumption, the Board declined to address Employer's argument that the ALJ erred in finding it did not rebut the presumption. *Ernest L. Nelson, Jr. v. Day, LLC*, BRB No. 19-0018 BLA, slip op. at 5 n.9 (Nov. 25, 2019) (unpub.).

⁷ The ALJ reiterated his finding Claimant did not establish complicated pneumoconiosis. Decision and Order on Remand at 54.

⁸ "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).

⁹ "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).

disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). Thus he reinstated the award of benefits and set the benefits commencement date as August 2014.

On appeal, Employer argues the ALJ erred in finding Claimant established clinical pneumoconiosis, legal pneumoconiosis, and total disability due to pneumoconiosis.¹⁰ It also asserts he erred in determining the commencement date for benefits. Claimant responds in support of the award of benefits. 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 ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.¹¹ 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).

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 element precludes an award of benefits. See *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).

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(a)(2), (b). The United States

¹⁰ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirteen years, ten months, and twenty days of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7.

¹¹ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 8; Director's Exhibit 4; Hearing Tr. at 30.

Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held a miner can establish legal pneumoconiosis by showing coal dust exposure contributed “in part” to his respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (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.”).

The ALJ considered the medical opinions of Drs. Habre, Rothfleisch, Basheda, and Zaldivar. Decision and Order on Remand at 36-50; Director’s Exhibits 14, 21, 22; Claimant’s Exhibits 3, 4; Employer’s Exhibits 6, 15, 16. He found Drs. Habre and Rothfleisch diagnosed legal pneumoconiosis and their opinions are reasoned and documented. Decision and Order on Remand at 36-50. He found Drs. Basheda and Zaldivar excluded the disease, but their opinions are inadequately explained and thus not credible. *Id.*

Employer argues the ALJ erred in finding the opinions of Drs. Habre and Rothfleisch sufficient to establish legal pneumoconiosis.¹² Employer’s Brief at 23-31. We disagree.

In his initial report, Dr. Habre diagnosed Claimant with legal pneumoconiosis in the form of chronic bronchitis due to tobacco smoking and coal mine dust exposure. Claimant’s Exhibits 3. He also diagnosed a totally disabling lung disease evidenced by a “significant decline in spirometric measurements and [] abnormal arterial blood gas with hypoxemia at rest” with “coal mine dust exposure play[ing] a substantial and significant role in causing his disabling disease, worsening his lung function, and respiratory symptoms.” *Id.* at. at 2-3. He set forth the following rationale:

This diagnosis is present with the chronic use of bronchodilators associated with respiratory symptoms mostly coughing, chronic dyspnea, exercise intolerance, and wheezing. These symptoms are present in both [Chronic

¹² Drs. Basheda and Zaldivar diagnosed Claimant with severe tobacco-induced chronic obstructive pulmonary disease (COPD) with an asthmatic component and opined this disease is unrelated to coal mine dust exposure. Director’s Exhibit 21; Employer’s Exhibits 6, 15, 16. The ALJ found Drs. Basheda’s and Zaldivar’s opinions “conclusory” because both doctors “failed to adequately account for Claimant’s coal mine dust exposure history” and thus their opinions are entitled to little weight. Decision and Order on Remand at 49. Employer does not challenge this finding; thus we affirm it. *Skrack*, 6 BLR at 1-711.

Obstructive Pulmonary Disease (COPD)] and smoking-related lung disease as well as coal workers' pneumoconiosis. It is due to the effect of coal dust on the airways. The effect of coal dust is additive to this of cigarette smoking causing inflammation of the airways. The symptoms are more common with increased dust exposure and are related to bronchitic changes in the large airways which include thickening of the airway mucosa, enlargement of the mucous glands, and the presence of airways hypersecretions. This is typically referred to as legal pneumoconiosis of chronic bronchitis, an entity arising from coal mine dust exposure.

...

[Claimant] did have an underlying chronic bronchitis with smoking habit a primary risk factor and coal mine dust exposure described as additive to tobacco use. Coal mine dust exposed workers do manifest higher prevalence of respiratory symptoms with underlying chronic bronchitis. This review also showed the presence of disabling lung disease based on the arterial blood gas and the significant decline in spirometric measurements. It is concluded that coal mine dust exposure plays a substantial and significant role in causing his disabling disease, worsening his lung function, and respiratory symptoms.

Id.

Dr. Habre reiterated his diagnosis of legal pneumoconiosis in a supplemental report. Claimant's Exhibit 4. He also indicated Claimant has complicated pneumoconiosis. *Id.* The ALJ permissibly found Dr. Habre's diagnosis of legal pneumoconiosis in his initial report credible because it is "sufficiently grounded in the objective evidence of record" and he "explained how Claimant's symptoms and objective testing were consistent with the additive effects of coal dust inhalation and smoking."¹³ Decision and Order on Remand at 48-49; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41 (4th Cir. 1997).

Dr. Rothfleisch noted Claimant's pulmonary function testing "demonstrates moderately severe obstructive disease without significant bronchodilator response." Director's Exhibit 14 at 2. He indicated Claimant is totally disabled by the "moderately severe" obstructive disease and the presence of dyspnea with exertion. *Id.* at 2-3.

¹³ The ALJ also separately found Dr. Habre's diagnosis of legal pneumoconiosis in his supplemental report reasoned and documented. Decision and Order on Remand at 48-49.

Specifically, he diagnosed Claimant with legal pneumoconiosis in the form of “chronic obstructive bronchitis” based on Claimant’s symptoms, tobacco smoking, coal mine dust exposure, and the objective testing of record. Director’s Exhibits 14, 22. Director’s Exhibits 14, 22. In addition, he stated this disease was caused by coal mine dust exposure and cigarette smoking. *Id.* But he further stated he “cannot state the relative contribution of each,” yet “with [fifteen] years of coal dust exposure, coal dust is at least a significant aggravating factor.” Director’s Exhibit 14 at 3. The ALJ permissibly concluded Dr. Rothfleisch’s opinion on legal pneumoconiosis is supported by the objective evidence and reasoned, and thus “entitled to substantial weight.” Decision and Order on Remand at 47, 49; *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Employer’s Brief at 25-28.

Employer argues the ALJ should have discredited the opinions of Drs. Habre and Rothfleisch because it contends they overestimated Claimant’s coal mine employment history. Employer’s Brief at 24-25. We disagree. The ALJ recognized both doctors assumed a coal mine employment history of fifteen years. Decision and Order on Remand at 36, 46. Although the ALJ found Claimant worked for thirteen years, ten months, and twenty days in coal mining, he was not required to discredit the opinions of Drs. Habre and Rothfleisch based on a discrepancy of approximately thirteen months of coal mine employment. *See Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984) (difference between seven years of coal mine employment the adjudicator found and eleven years a doctor assumed did not affect the weight given to the doctor’s opinion); *see also Looney*, 678 F.3d at 311 n.2 (characterizing a four year difference in the length of coal mine employment that a physician relied on and the length that the ALJ found established as “relatively insignificant,” and did not compel rejection of the physician’s opinion based on the longer length).

Employer also argues the ALJ erred in crediting Dr. Rothfleisch’s opinion on legal pneumoconiosis because his qualifications are absent from the record. Employer’s Brief at 25. We disagree. Although an ALJ may give greater or lesser weight to a physician’s opinion based on his or her qualifications, he is not required to do so. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993) (ALJ is not required to defer to physicians with allegedly superior qualifications); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Employer has not explained why Dr. Rothfleisch’s qualifications are relevant insofar as it does not challenge the ALJ’s finding that the opinions of Drs. Basheda and Zaldivar are entitled to little weight. *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”).

We also are not persuaded by Employer’s argument that the opinions of Drs. Habre and Rothfleisch cannot establish legal pneumoconiosis because the doctors indicated they could not allocate the relative contribution of coal mine dust exposure versus cigarette smoking as causes of Claimant’s obstructive impairment. Employer’s Brief at 26-31. As

coal dust need not be the sole cause of Claimant's respiratory or pulmonary impairment, Claimant can establish legal pneumoconiosis based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them. *Consol. Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *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 a 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 even where it is impossible to allocate a specific percentage between them); 20 C.F.R. §718.201(a)(2), (b).

Finally, Employer contends the opinions of Drs. Habre and Rothfleisch are inadequately reasoned and not sufficiently supported by the objective testing.¹⁴ Employer's Brief at 26-31. We consider Employer's argument to be a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and assign those opinions appropriate weight. *See Looney*, 678 F.3d at 316-17; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997). Because the ALJ acted within his discretion in crediting Drs. Habre's and Rothfleisch's opinions on legal pneumoconiosis, we affirm his finding that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order on Remand at 50.

Disability Causation

To prove total disability due to pneumoconiosis, Claimant must establish pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). 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 it "[m]aterially worsens a totally disabling

¹⁴ Contrary to Employer's argument, Dr. Rothfleisch did not indicate he would always diagnose legal pneumoconiosis in cases where a miner has been exposed to coal mine dust. Employer's Brief at 26-31. Rather, he stated his diagnosis of legal pneumoconiosis is based on Claimant's fifteen years of coal mine dust exposure, symptoms of daily wheezing and significant dyspnea, and pulmonary function testing demonstrating moderately severe obstruction. Director's Exhibit 23. Based on his evaluation of Claimant and the objective testing of record, he stated there is no "basis to assert that this [Claimant's] pulmonary disease is due exclusively to tobacco use." *Id.*

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); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Employer contends the ALJ erred in crediting Dr. Habre’s opinion¹⁵ on disability causation.¹⁶ Employer’s Brief at 31-34. We disagree.

As discussed above, Dr. Habre opined in his initial report that Claimant has a totally disabling lung disease evidenced by a “significant decline in spirometric measurements and [] abnormal arterial blood gas with hypoxemia at rest” with “coal mine dust exposure play[ing] a substantial and significant role in causing his disabling disease, worsening his lung function, and respiratory symptoms.” Claimant’s Exhibit 3 at 2-3. Thus he opined Claimant’s disabling lung disease constitutes legal pneumoconiosis. *Id.* The ALJ permissibly found Dr. Habre’s opinion reasoned and documented on the etiology of Claimant’s lung disease. Decision and Order on Remand at 48-49, 62-63. Thus Dr. Habre’s opinion establishes Claimant’s disabling lung disease constitutes legal pneumoconiosis, and therefore establishes legal pneumoconiosis was a substantially contributing cause of Claimant’s total disability.¹⁷ *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner’s COPD constituted legal pneumoconiosis and all medical experts agreed COPD contributed to the miner’s death); see *Energy West Mining Co. v. Dir.*, *OWCP*, 49 F.4th

¹⁵ The ALJ found Dr. Rothfleisch’s opinion insufficient to establish total disability due to pneumoconiosis. Decision and Order on Remand at 62-63.

¹⁶ Employer does not challenge the ALJ’s finding that Drs. Basheda’s and Zaldivar’s opinions on disability causation are entitled to little weight because they failed to diagnose legal pneumoconiosis. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), citing *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order on Remand at 62-63. Thus we affirm this finding. *Skrack* 6 BLR at 1-711.

¹⁷ Employer argues the ALJ erred in failing to address whether Dr. Habre’s diagnosis of total disability due to legal pneumoconiosis was affected by his erroneous opinion that Claimant has complicated pneumoconiosis. Employer’s Brief at 33-34. As noted above, however, Dr. Habre diagnosed complicated pneumoconiosis only in his supplemental report after reviewing additional evidence, Claimant’s Exhibit 4, while the ALJ found his initial diagnosis of disabling legal pneumoconiosis separately reasoned and documented. Decision and Order on Remand at 48-49. As Dr. Habre’s initial, credible diagnosis was made before his acknowledgment that Claimant has complicated pneumoconiosis, Claimant’s Exhibit 3, we are not persuaded by Employer’s argument that the ALJ is required to revisit the credibility of Dr. Habre’s opinion.

1362, 1369 (10th Cir. 2022); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts agreed COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019); 20 C.F.R. §718.204(c).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability due to pneumoconiosis through Dr. Habre's opinion. 20 C.F.R. §718.204(c). Consequently, we affirm the ALJ's finding that Claimant established entitlement under 20 C.F.R. Part 718 and affirm the award of benefits.¹⁸

Commencement Date of Benefits

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The ALJ again found benefits begin the month the claim was filed, which he indicated was in August 2014. Decision and Order on Remand at 63. As the Board previously noted and as Employer correctly contends, while Claimant signed his application in August 2014, the claim was not filed with the district director until September 2014 based on the date stamp on the application. *Nelson*, BRB No. 19-0018 BLA, slip op. at 6 n.10; 20 C.F.R. §725.303(a)(1) ("A claim shall be considered filed on the day it is received by the office in which it is first filed."); Director's Exhibit 3; Employer's Brief at 35.

Notwithstanding the ALJ's error, the facts do not require a remand for further consideration of this issue. While factual determinations are within the province of the ALJ, reversal is warranted where no factual issues remain to be determined. *See Collins*, 751 F.3d at 187 (reversing denial, as no factual issue remained as to the cause of death,

¹⁸ Because we affirm the ALJ's finding that Claimant is totally disabled due to legal pneumoconiosis, we need not address Employer's argument that the ALJ erred in finding clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 28-31.

with directions to award benefits without further administrative proceedings); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same).

The ALJ erroneously found for the second time that Claimant's benefits commence August 2014. Decision and Order at 63; Decision and Order on Remand at 63. As the month in which Claimant became totally disabled due to pneumoconiosis is not ascertainable, the evidence requires a finding that benefits commence September 2014, the month this claim was filed. There is no other evidence in the record to support an alternative finding. Consequently, we modify the ALJ's commencement date determination to September 2014.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Remand is affirmed, as modified to reflect a commencement date of September 2014 for the payment of benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge