

U.S. Department of Labor

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



BRB No. 23-0203 BLA

LARRY D. BEVINS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
H M N & S COAL COMPANY)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS’)	DATE ISSUED: 01/05/2024
PNEUMOCONIOSIS FUND)	
)	
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 of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

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

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits (2020-BLA-05188) on a claim filed on January 29, 2018,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had thirteen years of qualifying 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, the ALJ found Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis, and therefore awarded benefits. 20 C.F.R. §§718.202, 718.204(b), (c).

¹ The ALJ appears to have relied on the date Claimant signed his miner's claim, January 29, 2018, rather than the date the claim was received by the office of the district director, February 9, 2018, to determine when the claim was filed and thus when benefits commence. *See* 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."); *but see* 20 C.F.R. §725.303(b) (a claim "submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark"); 20 C.F.R. §725.503(b) (benefits commencement date); Decision and Order at 2; Director's Exhibit 8. Although Employer generally summarizes the claim as having been filed on February 9, 2018, it does not directly contest the ALJ's findings the claim was filed, and benefits commence, in January 2018; thus, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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); 20 C.F.R. §718.305.

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and that his total disability was caused by pneumoconiosis.³ Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Entitlement - 20 C.F.R. Part 718

Without the benefit of any presumption,⁵ Claimant must establish disease (pneumoconiosis);⁶ 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. Failure to establish any one of these 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, 1-2 (1986) (en banc).

Legal Pneumoconiosis

³ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established thirteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. See *Skrack*, 6 BLR at 1-711; Decision and Order at 3 n.11, 4, 21.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18; Director's Exhibit 9.

⁵ The ALJ found Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, as the record does not contain evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); see 20 C.F.R. §718.304; Decision and Order at 8.

⁶ The ALJ found Claimant did not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 7, 16, 18.

To establish legal pneumoconiosis,⁷ 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). The United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, 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, 309, 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 opinions of Drs. Gaziano, Raj, Green, Werchowski, and Zaldivar.⁸ Decision and Order at 15; Director’s Exhibit 32; Employer’s Exhibits 1, 4; Claimant’s Exhibits 2, 4. He noted that all of the physicians agree Claimant has chronic obstructive pulmonary disease (COPD) but disagree about its etiology. Decision and Order at 16, 21. The ALJ found the opinions of Drs. Gaziano, Raj, Green, and Werchowski diagnosing legal pneumoconiosis were reasoned and documented and outweighed Dr. Zaldivar’s contrary opinion. Decision and Order at 18.

Employer argues the ALJ failed to adequately explain his credibility determinations. Employer’s Brief at 3-11. We disagree.

Dr. Gaziano conducted the Department of Labor’s complete pulmonary evaluation of Claimant on April 19, 2018, and opined his COPD was related to both smoking and coal mine dust exposure. Director’s Exhibit 32 at 5. Dr. Raj indicated the “individual contribution[s]” of Claimant’s coal dust exposure and smoking history to his pulmonary impairment cannot be determined but opined that coal mine dust exposure had a “substantial and significant role” in causing Claimant’s COPD. Claimant’s Exhibit 2 at 4. Dr. Green also examined Claimant and similarly opined his significant smoking and

⁷ “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).

⁸ We affirm as unchallenged the ALJ’s findings that the physicians were all equally qualified and possessed a similar understanding of Claimant’s work, medical, and smoking histories. *See Skrack*, 6 BLR at 1-711; Decision and Order at 4, 15.

occupational histories both caused his COPD and that his occupational history was a “substantial contributing factor.” Claimant’s Exhibit 4 at 5. As the ALJ noted, Dr. Green “concluded the diagnosis of legal pneumoconiosis is supported by chronic symptoms of cough, wheeze, shortness of breath and mucus expectoration in the setting of a thirteen-year occupational history of exposure to respirable coal and rock dust and the persistent and consistent findings of severe airflow obstruction on multiple pulmonary function studies and spirometry tests.” Decision and Order at 14; *id.* at 4-5.

Employer asserts the opinions of Drs. Gaziano, Raj, and Green are conclusory and insufficient to support Claimant’s burden of proof because they do not actually apportion the effects of smoking and coal mine dust exposure on Claimant’s obstructive respiratory impairment. Employer’s Brief at 4-8. However, a physician is not required to specifically apportion the contributions of coal mine dust exposure and smoking to a miner’s lung disease in order to support a finding of legal pneumoconiosis. See 20 C.F.R. §718.201(b); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); see also *Looney*, 678 F.3d at 311-12 (physician’s opinion that lung disease arose from a combination of coal mine dust exposure and smoking was sufficient to establish legal pneumoconiosis); Employer’s Brief at 8-9, 11. Rather, a physician need only credibly diagnose a chronic respiratory or pulmonary impairment that is “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b). Because Drs. Gaziano, Raj, and Green specifically opined Claimant’s COPD is significantly related to or substantially aggravated by coal dust exposure, we see no error in the ALJ’s determination that their opinions are sufficient to establish legal pneumoconiosis.⁹ See *Cochran*, 718 F.3d at 322-23; *Looney*, 678 F.3d at 311-12; Decision and Order at 17-18.

Additionally, the ALJ permissibly found their opinions reasoned and documented as they relied on the objective evidence, Claimant’s symptoms, and an accurate understanding of his smoking and coal mine dust exposure histories to support their conclusions.¹⁰ See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 211 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is

⁹ Employer contends the ALJ mischaracterized the opinions of Drs. Gaziano, Green, and Werchowski as discussing the additive effects of smoking and coal dust exposure. Employer’s Brief at 7-9, 11; see Decision and Order at 17-18. The ALJ’s error, if any, is harmless since she provided other valid reasons for finding their opinions reasoned and documented. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

¹⁰ Employer concedes Dr. Werchowski diagnosed legal pneumoconiosis and makes no specific argument that his opinion is not well-reasoned. Employer’s Brief at 6, 8.

one in which the ALJ finds the underlying documentation adequate to support the physician's conclusions); Decision and Order at 16-18.

Regarding Dr. Zaldivar's opinion, we see no error in the ALJ's determination to accord it little weight. Dr. Zaldivar opined Claimant's severe obstruction is due entirely to his history of smoking, as well as exposure to secondhand smoke and "biomass smoke" as a child. Employer's Exhibit 1 at 4, 6. The ALJ accurately noted that Dr. Zaldivar excluded a diagnosis of legal pneumoconiosis, in part, because there was no radiographic evidence of clinical pneumoconiosis. Decision and Order at 17; Employer's Exhibit 1 at 4-6. Contrary to Employer's contention, the ALJ permissibly found Dr. Zaldivar's opinion inconsistent with the regulations, which do not require radiographic evidence of clinical pneumoconiosis in order to diagnose legal pneumoconiosis.¹¹ See 20 C.F.R. §718.201(a)(2), (b); see also 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); *Looney*, 678 F.3d at 313; Decision and Order at 17. Additionally, she permissibly found that Dr. Zaldivar did not adequately explain why Claimant's coal dust exposure was not an aggravating factor in his COPD even if it was primarily caused by his significant smoking history. See *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 16-17.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established legal pneumoconiosis based on the medical opinions and the evidence as a whole. See 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) ("The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable."); Decision and Order at 15-18.

Disability Causation

To establish disability causation, 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 if it has "a material adverse effect on the miner's respiratory or pulmonary condition"

¹¹ In one section of his opinion, Dr. Zaldivar purported to agree that lack of "radiographic evidence of pneumoconiosis does not exclude the possibility of legal pneumoconiosis," Employer's Exhibit 1 at 4-5, but nevertheless concluded that because "there is no radiographic evidence of pneumoconiosis . . . there is no damage caused mineral dust retained within [Claimant's] lungs." *Id.* at 6.

or “[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); see *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

Employer raises the same arguments on disability causation that it did regarding legal pneumoconiosis. Employer’s Brief at 9-11. However, as discussed above, the ALJ permissibly relied on Drs. Raj’s, Green’s, and Gaziano’s opinions in finding Claimant’s totally disabling obstructive impairment constitutes legal pneumoconiosis. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 16, 21-22. We therefore see no error in the ALJ’s finding their opinions are also sufficient to establish that Claimant’s legal pneumoconiosis is 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); Decision and Order at 21-22.

The ALJ permissibly discredited Dr. Zaldivar’s disability causation opinion because he did not diagnose legal pneumoconiosis, contrary to her finding that Claimant established the presence of the disease. See *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), quoting *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (such an opinion “may not be credited at all” on disability causation absent “specific and persuasive reasons” for concluding the physician’s view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 21-22. Additionally, while Employer summarized Dr. Werchowski’s disability causation opinion, it raises no specific challenge to the ALJ’s discrediting of his opinion on disability causation. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22; Employer’s Brief at 10-11. As substantial evidence supports the ALJ’s finding that Claimant is totally disabled due to legal pneumoconiosis, we affirm it. 20 C.F.R. §718.204(c).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge