



BRB No. 19-0391 BLA

DORSIE WIREMAN (o/b/o DONALD WIREMAN)	)	
	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HBK CORPORATION	)	
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	DATE ISSUED: 07/30/2020
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Jennifer L. Conner (Law Office of John C. Collins), Salyersville, Kentucky, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer/Carrier.

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

PER CURIAM:

Claimant<sup>1</sup> appeals Administrative Law Judge Larry W. Price's Decision and Order on Remand (2011-BLA-06304) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a Miner's claim filed on February 22, 2010, and is before the Benefits Review Board for a second time.

In his initial decision, the administrative law judge credited the Miner with nine years of coal mine employment and therefore found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>2</sup> Considering whether Claimant established entitlement to benefits without the aid of any presumptions,<sup>3</sup> the administrative law judge found she established the Miner was totally disabled but failed to establish he had pneumoconiosis and denied benefits. 20 C.F.R. §§718.202(a), 718.204(b)(2).

Upon review of Claimant's appeal, the Board affirmed as unchallenged the administrative law judge's findings nine years of coal mine employment and Claimant did not invoke Section 411(c)(4) presumption.<sup>4</sup> *Wireman v. HBK Corp.*, BRB No. 18-0076 BLA, slip op. at 3 n.4 (Dec. 31, 2018) (unpub.). The Board also affirmed his findings the x-ray evidence did not establish clinical pneumoconiosis and the medical opinion evidence

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<sup>1</sup> Claimant is the widow of the Miner, who died on October 16, 2012, while his claim was pending before the Office of Administrative Law Judges. Claimant's Exhibit 4. Claimant is pursuing the Miner's claim on his behalf.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the evidence establishes 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) (2012); 20 C.F.R. §718.305.

<sup>3</sup> The administrative law judge also found no evidence of complicated pneumoconiosis and therefore Claimant 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); 718.304.

<sup>4</sup> The Board also noted there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304; *Wireman v. HBK Corp.*, BRB No. 18-0076 BLA, slip op. at 2 n.3 (Dec. 31, 2018) (unpub.).

did not establish legal pneumoconiosis.<sup>5</sup> *Id.* at 4, 6-7. The Board, however, vacated the administrative law judge's finding the biopsy evidence did not establish clinical pneumoconiosis because he did not explain his determination as required by the Administrative Procedure Act (APA).<sup>6</sup> *Id.* at 5. Finally, the Board vacated the administrative law judge's discrediting of Dr. Ammisetty's opinion based on his reliance on the biopsy evidence. *Id.* Thus, the Board vacated the denial of benefits and remanded the case for further consideration of whether Claimant established clinical pneumoconiosis and, if necessary, whether she established the Miner's total disability was due to clinical pneumoconiosis. *Id.* at 7.

On appeal, Claimant contends the administrative law judge erred in finding that she did not establish the existence of clinical pneumoconiosis. Employer and its Carrier respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

The 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.<sup>7</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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.

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<sup>5</sup> "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). "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).

<sup>6</sup> The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

<sup>7</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

§§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist Claimant to establish these elements when certain conditions are met, but failure to establish any one precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

### **Biopsy Evidence – Clinical Pneumoconiosis**

The Miner underwent a biopsy on May 9, 2012, and tissue samples were obtained from the right mediastinal lymph node and the right and left paratracheal lymph nodes. Claimant’s Exhibit 3. Dr. Combs prepared the surgical biopsy report and noted the tissue samples showed “varying degrees of sinus histiocytosis . . . containing brown to black refractile pigment.” *Id.* She also noted “[a] few scattered hyalinized nodules [were] seen consistent with silica nodules.” *Id.* Dr. Combs diagnosed anthracosilicosis and opined that the biopsy was negative for malignant cells. *Id.*

Dr. Caffrey reviewed the four biopsy slides and indicated he was unable to diagnose clinical pneumoconiosis or any lung disease because the slides contained lymph node tissue and not lung tissue. Employer’s Exhibit 2. Dr. Caffrey noted a “mild to moderate amount of anthracotic pigment” and disagreed with Dr. Combs’s use of the terms “anthracosis” or “anthracosilicosis” to describe the biopsy findings. *Id.*

The administrative law judge correctly noted “anthracosis” and “anthracosilicosis” are included in the definition of clinical pneumoconiosis under the regulations. Decision and Order on Remand at 4; *see* 20 C.F.R. §718.201. Contrary to Claimant’s contention, however, the administrative law judge permissibly found she did not establish clinical pneumoconiosis based on Dr. Combs’s report. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Relying on Dr. Caffrey’s qualifications<sup>8</sup> and the descriptions of the biopsy material Drs. Combs and Caffrey provided, the administrative law judge permissibly found that while the Miner underwent a biopsy for diagnosis of a lung mass, the tissue samples obtained were from mediastinal and paratracheal lymph nodes and not lung tissue.<sup>9</sup>

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<sup>8</sup> We affirm as unchallenged the administrative law judge’s determination that Dr. Caffrey “is more qualified and experienced” than Dr. Combs in the field of pathology. Decision and Order on Remand at 3; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>9</sup> The administrative law judge noted “the biopsied lymph nodes were of the mediastinum. The mediastinum includes structures ‘except the lungs.’ The paratracheal lymph nodes are contained within the mediastinum.” Decision and Order on Remand at 3 n.5, quoting *Stedman’s Medical Dictionary* 1006, 1074 (26th Ed. 1995).

Decision and Order on Remand at 3. He correctly noted that biopsy evidence under the Act explicitly requires inclusion of “a detailed gross macroscopic and microscopic description of the *lungs* or visualized portion of a *lung*.” Decision and Order on Remand at 3, *quoting* 20 C.F.R. §718.106(a) (emphasis added). Moreover, clinical pneumoconiosis is defined as “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) (emphasis added). We see no error in the administrative law judge’s conclusion that “the biopsy evidence on its face fails to comply with the regulations” as “the biopsied material is not lung tissue but lymph node tissue.”<sup>10</sup> Decision and Order on Remand at 3; *see Rowe*, 710 F.2d at 255.

Because the administrative law judge has explained his findings in accordance with the Board’s remand instructions and the APA, we affirm his determination that Claimant did not establish clinical pneumoconiosis based on the biopsy evidence. 20 C.F.R. §718.202(a)(2); *See Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 132 (4th Cir. 1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order on Remand at 3.

### **Medical Opinion Evidence – Clinical Pneumoconiosis**

The administrative law judge considered three medical opinions regarding whether the Miner had clinical pneumoconiosis. Dr. Ammisetty diagnosed clinical pneumoconiosis and Drs. Broudy, Dahhan, and Rosenberg did not. Director’s Exhibit 15; Claimant’s Exhibits 1, 2, 5; Employer’s Exhibits 2, 3, 9, 10. Dr. Ammisetty based his diagnosis of clinical pneumoconiosis, in part, on positive x-rays and Dr. Combs’s biopsy report. Claimant’s Exhibits 2, 5. As we previously affirmed in the prior appeal the administrative law judge’s finding that the preponderance of the x-ray evidence is negative for clinical pneumoconiosis, and we find *infra* at 5 that the biopsy evidence is insufficient to support a finding of clinical pneumoconiosis, we affirm the administrative law judge’s rejection of Dr. Ammisetty’s opinion as not sufficiently reasoned.<sup>11</sup> *See Jericol Mining, Inc. v. Napier*,

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<sup>10</sup> Because the administrative law judge permissibly found the biopsy evidence does not comply with the regulations, we need not address Claimant’s arguments that Dr. Caffrey’s views on anthracosis and anthracosilicosis conflict with the regulatory definition of clinical pneumoconiosis. Claimant’s Brief at 11-12.

<sup>11</sup> Because we affirm the administrative law judge’s discrediting of Dr. Ammisetty’s opinion on clinical pneumoconiosis, we need not address Claimant’s assertions the administrative law judge erred in crediting Drs. Broudy’s, Dahhan’s, and Rosenberg’s opinions that the Miner did not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant’s Brief 15-17.

301 F.3d 703, 713-714 (6th Cir. 2002); *Rowe*, 710 F.2d at 255; Decision and Order on Remand at 4. We therefore affirm the administrative law judge's finding that Claimant did not establish the existence of clinical pneumoconiosis based on the medical opinion evidence.<sup>12</sup> *Id.*

Because Claimant did not establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We therefore affirm the administrative law judge's finding Claimant did not establish entitlement to benefits. Decision and Order on Remand at 4.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

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<sup>12</sup> Claimant generally asserts on appeal that she established legal pneumoconiosis. The Board, however, previously affirmed the administrative law judge's finding that the evidence did not establish legal pneumoconiosis and that holding constitutes the law of the case. *Wireman*, BRB No. 18-0076 BLA, slip op. at 6-7; see *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).