

U.S. Department of Labor

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



BRB No. 21-0648 BLA

JANICE GRIFFITH )  
(o/b/o and Widow of THOMAS GRIFFITH) )  
 )  
Claimant-Respondent )

v. )  
 )

VIRGINIA POCAHONTAS COMPANY )  
 )  
Self-Insured )  
Employer-Petitioner )

DATE ISSUED: 6/26/2023

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

DECISION and ORDER

Party-in-Interest

Appeal of the Decision and Order Awarding Benefits of Susan Hoffman,  
Administrative Law Judge, United States Department of Labor.

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

Jason A. Mullins (Penn, Stuart & Eskridge), Abingdon, Virginia, for  
Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Susan Hoffman's Decision and  
Order Awarding Benefits (2019-BLA-05347) 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 miner's claim filed on March 30, 2017.<sup>1</sup>

The ALJ credited the Miner with seven and one-half years of underground 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).<sup>2</sup> Considering entitlement under 20 C.F.R. Part 718, she found Claimant did not establish the Miner had clinical pneumoconiosis<sup>3</sup>, but established legal pneumoconiosis<sup>4</sup> and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.201(a)(1), 718.202(a), 718.204(b)(2), (c). Thus she awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and disability due to legal pneumoconiosis.<sup>5</sup> Claimant responds in support

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<sup>1</sup> On May 31, 2022, the Miner's counsel informed the Benefits Review Board the Miner died on May 01, 2022. On June 15, 2022, the Miner's counsel filed a letter stating the Miner's wife, Janice Griffin, is now pursuing this claim on the Miner's behalf. Thus, Janice Griffin is now considered the Claimant in this case.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had 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.

<sup>3</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 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).

<sup>4</sup> "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).

<sup>5</sup> We affirm, as unchallenged on appeal, the ALJ's findings the Miner had seven and one-half years of coal mine employment and established total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 8-9, 33.

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 ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>6</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & 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**

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis. Employer's Brief at 3-8. We disagree.

To establish legal pneumoconiosis, Claimant must demonstrate the Miner had 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). Further, the United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, has held a claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to a miner's 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

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<sup>6</sup> The Board will apply the law of United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.3; Director's Exhibit 3; Hearing Tr. at 27.

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. Fino, Forehand, McSharry, Nader, and Raj. Decision and Order at 13-21, 25-28. Dr. Forehand recorded the Miner smoked one pack per day from 1966 to 1999, or a thirty-three-pack year history. Director’s Exhibit 19. He diagnosed legal pneumoconiosis in the form of obstructive lung disease based on the Miner’s shortness of breath, histories of coal mine dust exposure and tobacco smoking, and the pulmonary function study results. Director’s Exhibits 13, 19. Dr. Nader recorded the Miner smoked one pack per day for twenty-four years from 1968 to 1992. Claimant’s Exhibit 8. Dr. Raj noted the Miner smoked one-half pack per day from 1966 to 1993 and smoked electronic cigarettes from 2017 onwards. Claimant’s Exhibit 7. Drs. Nader and Raj opined the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) based on the Miner’s symptoms, histories of tobacco smoking and coal mine dust exposure, and the pulmonary function study results. Claimant’s Exhibits 7, 8.

Dr. Fino recorded a smoking history of one pack per day for thirteen years from 1967 until 1980. Employer’s Exhibit 1. Dr. McSharry reported in May 2018 the Miner smoked one pack per day from 1969 to 1999, but was smoking electronic cigarettes at the time of his examination. Director’s Exhibit 22. Drs. Fino and McSharry diagnosed hypoxemia, but opined the Miner did not have legal pneumoconiosis. Employer’s Exhibits 1, 2. Dr. Fino concluded the Miner’s impairment was due to blood clots in his lungs that caused a “severe oxygen transfer abnormality.” Employer’s Exhibit 1 at 10-11. Dr. McSharry stated the Miner’s “disabling hypoxemia” was due to his tobacco smoking history and a pulmonary embolism. Employer’s Exhibit 2 at 3; *see* Director’s Exhibit 22; Employer’s Exhibits 11, 14.

The ALJ found Dr. Forehand’s opinion “documented and reasoned” and determined the opinions of Drs. Nader and Raj are “well documented and reasoned” on the issue of legal pneumoconiosis; thus she assigned them “great weight.” Decision and Order at 26-28. She also allocated “greater weight” to the opinions of Drs. Forehand, Nader, and Raj because the treatment records support their opinions that the Miner’s COPD and emphysema are due to both his “significant history of cigarette smoking and his significant history of coal mine dust exposure”. *Id.* at 28. Contrarily, she found Dr. McSharry’s opinion “not well-supported” and accorded it “less weight.” *Id.* at 27. Further, she determined Dr. Fino “did not discuss Claimant’s obstructive impairment since he stated the pulmonary function study results he obtained were invalid due to sub-maximal effort.” *Id.* Thus she found Claimant established the existence of legal pneumoconiosis based on the opinions of Drs. Forehand, Nader, and Raj. *Id.* at 27-28.

Employer contends the ALJ erred in finding the opinions of Drs. Forehand, Nader, and Raj sufficient to meet Claimant's burden to establish legal pneumoconiosis, asserting their opinions are unreasoned to the extent they relied on an inaccurate smoking history. Employer's Brief at 7-8. We disagree.

It is the province of the ALJ to evaluate the physician's opinions. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The ALJ found Claimant had between a thirty-three and forty-five year history of smoking one pack of cigarettes per day with an undetermined additional exposure to nicotine from electronic cigarettes in recent years. Decision and Order at 5-6. Drs. Forehand, Nader, and Raj all understood Claimant to have a significant history of cigarette smoking generally consistent with the ALJ's finding. Director's Exhibits 13, 19; Claimant's Exhibits 7, 8. The ALJ accurately noted Drs. Forehand, Nader, and Raj considered the Miner's history of coal mine dust exposure, medical history, objective testing, and the additive nature of tobacco smoking and coal mine dust exposure and explained their conclusions that coal mine dust exposure was a substantially contributing cause of the Miner's obstructive disease. Decision and Order at 13-15, 19-21, 26-28; Director's Exhibits 13, 19; Claimant's Exhibits 7, 8.

Contrary to Employer's argument, the ALJ permissibly found the opinions of Drs. Forehand, Nader, and Raj credible in part because their attribution of the Miner's lung disease and impairment to the combined effects of smoking and coal mine dust exposure is consistent with the medical science credited by the DOL that the risks associated with the two exposures are additive. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006) (doctor need not apportion a specific percentage of a miner's lung disease to cigarette smoke versus coal mine dust exposure to establish the existence of legal pneumoconiosis); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 27 (noting "the prevailing medical opinion evidence accepted by the DOL that coal dust and smoking have additive effects"). As substantial evidence supports the ALJ's findings that Drs. Forehand, Nader and Raj predicated their diagnoses on Claimant's symptoms, test results, substantial smoking history, and history of coal dust exposure, the ALJ permissibly found their opinions sufficiently documented and reasoned. *See Morrison*, 644 F.3d at 478; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 28.

Employer further argues the ALJ erred in crediting Dr. Forehand's opinion because it was initially based on an inaccurate length of coal mine employment and an incorrect notation of the Miner's coal mine jobs. Employer's Brief at 4-5. Because Dr. Forehand

maintained his opinion that the Miner had legal pneumoconiosis even after DOL advised him of the correct information, we do not find Employer's argument persuasive.

Employer is correct that Dr. Forehand initially considered a forty-year coal mine employment history and identified the Miner's usual work as being a "driller/shooter." Employer's Brief at 4. But Dr. Forehand's incorrect understanding was "revealed to him by the Department of Labor [DOL]." Claimant's Response Brief at 4-5. As the ALJ accurately noted, the district director subsequently informed Dr. Forehand the Miner "worked 7.98 years in coal mine employment as a mine foreman, general manager, and mine superintendent and that he worked from 1983 to 2003 as a Federal Mine Inspector." Decision and Order at 14; *see* Director's Exhibit 18.

The district director then asked the doctor to discuss, based on the new information, the role pneumoconiosis played in the Miner's respiratory impairment and whether the Miner's coal mine employment "caused or significantly contributed to his coal workers' pneumoconiosis." *Id.* Contrary to Employer's argument, Dr. Forehand reaffirmed his opinion that the Miner had legal pneumoconiosis and is totally disabled based on the corrected information the district director provided. He offered specific reasons for opining "that 7.98 years of exposure to coal mine dust was sufficient to cause a coal mine dust-related lung disease," including the Miner's irreversible obstruction and gas exchange impairment, and stated the Miner's "abnormally low pO<sub>2</sub> of 49 leaves [him] with an insufficient amount of oxygen in his body to return to his last coal mining job as a general manager and mine superintendent." Director's Exhibit 19 at 2-3. We thus reject Employer's argument that Dr. Forehand's opinion is based on inaccurate information and "merely assumed evidence that is not in the record in an effort to support a poorly-reasoned decision." Employer's Brief at 5.

We also reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Fino and McSharry because they had a better understanding of the Miner's smoking history. Employer's Brief at 5-8. Regardless of Drs. Fino's and McSharry's understanding of the Miner's smoking history, the ALJ permissibly rejected their opinions for failing to adequately explain why Claimant's history of coal dust exposure also did not contribute to his impairment. Decision and Order at 26-28; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40.

Additionally, Employer argues the ALJ erred in discrediting Dr. McSharry's opinion "for a lack of comment on [the Miner's] dust exposure as a[] [federal mine] inspector." Employer's Brief at 6-7. Contrary to Employer's argument, the ALJ acknowledged that the Miner's work as "a mine inspector for [the Mine Safety and Health Administration] is not qualifying coal mine employment under the Act[.]" Decision and Order at 27. She nevertheless permissibly discredited Dr. McSharry's opinion, in part, because his broad

conclusion that the Miner’s impairment was unrelated to his “relatively short” history of “coal dust exposure” failed to distinguish between the Miner’s exposures during his more than seven years of employment as a miner, and his twenty-five years as a federal mine inspector.<sup>7</sup> Decision and Order at 22. The effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion is a determination for the ALJ to make. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick*, 13 BLR at 1-54; see also *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984) (adjudicator properly rejected opinions regarding causation based on inaccurate work histories where doctor failed to mention 28 years exposure to freon gas and acetylene torch fumes).

The ALJ also accurately found Dr. McSharry relied, in part, on the lack of radiographic findings to opine the Miner does not have legal pneumoconiosis.<sup>8</sup> Decision and Order at 27. She permissibly found Dr. McSharry’s opinion unpersuasive because the regulations provide legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. See *Looney*, 678 F.3d at 313 (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); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ properly concluded the regulations provide legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.201, 718.202(a)(4), 718.202(b); Decision and Order at 27.

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<sup>7</sup> Dr. McSharry initially relied on a “40-year history of underground coal mine employment” including as “an MSHA inspector for 25 years of that time.” Director’s Exhibit 22 at 5. He subsequently reevaluated his opinion to account for the fact that the “Department of Labor has credited [the Miner] with eight years of coal mine employment ending in 2003,” which he stated is “significantly different than the 40-year history of coal mine employment and coal dust exposure” he initially recorded. *Id.* at 2. Thus, as the ALJ held, Dr. McSharry had an accurate understanding of the number of years the Miner worked as a miner, but in opining the Miner’s impairment was wholly unrelated to any coal dust exposure he failed to account for, or explain his opinion in light of, the Miner’s years of exposure as a miner versus those as a non-miner.

<sup>8</sup> The ALJ noted Dr. McSharry’s opinion that “[l]acking radiographic findings supporting a diagnosis of pneumoconiosis, and with no abnormalities not reasonably explained by other known risk factors, I feel that the diagnosis of legal pneumoconiosis cannot be made to a reasonable degree of medical certainty.” Decision and Order at 27, citing Director’s Exhibit 22 at 3.

Moreover, the ALJ determined Dr. McSharry's opinion that Claimant's impairment was caused by smoking did not address the scientific evidence credited by the Department of Labor (DOL) that the risk of coal dust and smoking are not mutually exclusive but may be additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 22. She also found the doctor "failed to explain why [the Miner's] significant coal mine dust exposure was not a contributing or aggravating factor in his obstructive impairment." *Id.*; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); *Cochran*, 718 F.3d at 324; 20 C.F.R. §718.201(a)(2), (b). Thus, the ALJ permissibly found Dr. McSharry's opinion "not well-supported" and entitled to "less weight." Decision and Order at 22; *see Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40.

Employer generally argues Drs. Fino's opinion is well-reasoned and documented, and therefore sufficient to establish the Miner did not have legal pneumoconiosis. Employer's Brief at 7. Because Employer has not identified any specific error in the ALJ's weighing of this evidence, we affirm her finding. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b); 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 25, 27.

Because it is supported by substantial evidence, we affirm the ALJ's finding the preponderance of the medical opinion evidence establishes the Miner had legal pneumoconiosis. Decision and Order at 28.

### **Disability Causation**

Employer argues the ALJ erred in finding the Miner's total disability was due to legal pneumoconiosis. Employer's Brief at 9-10. We disagree. To establish disability causation, 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); *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 "[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); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Dr. Forehand opined the Miner is totally disabled by hypoxemia. Director's Exhibits 13, 19. Dr. Nader determined the Miner is totally disabled due to COPD and significant hypoxemia at rest. Claimant's Exhibit 8. Dr. Raj opined the Miner is totally disabled by COPD. Claimant's Exhibit 7 As discussed above, the ALJ permissibly relied



on the opinions of Drs. Forehand, Nader, and Raj to conclude the Miner's totally disabling pulmonary impairment constitutes legal pneumoconiosis. Decision and Order at 33-36. We therefore see no error in the ALJ's finding that Claimant established legal pneumoconiosis was a substantially contributing cause of the Miner's 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 35-36.

Similarly, having already rejected the opinions of Drs. Fino and McSharry on whether the Miner's totally disabling impairments constitute legal pneumoconiosis, the ALJ did not err in rejecting their opinions that legal pneumoconiosis did not cause the Miner's disability. Decision and Order at 33-36. Further, both opined the Miner's disability was unrelated to legal pneumoconiosis because the Miner did not have the disease, contrary to the ALJ's finding, rendering their opinions not credible on causation. *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) (Where a physician erroneously fails to diagnose pneumoconiosis, his opinion on causation "may not be credited at all" absent "specific and persuasive reasons" for concluding it is independent of the mistaken belief the miner did not have the disease.)); Director's Exhibit 22; Employer's Exhibits 1, 2, 11, 14.

As substantial evidence supports the ALJ's finding the opinions of Drs. Forehand, Nader, and Raj are well-reasoned and documented, and because their opinions establish legal pneumoconiosis substantially contributed to the Miner's disability, we affirm the ALJ's finding of disability causation pursuant to 20 C.F.R. §718.204(c). We therefore affirm the award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge