

BRB No. 20-0021 BLA

CANDITA GOODE)
(o/b/o The Estate of BRUCE E. GOODE))

Claimant-Petitioner)

v.)

AMERICAN ENERGY, LLC)

and)

ROCKWOOD CASUALTY INSURANCE)
COMPANY)

Employer/Carrier-)
Respondents)

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

Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 03/11/2025

DECISION and ORDER

Appeal of the Decision and Order Granting Petition for Modification in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.¹

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

¹ Claimant is the widow of the Miner, who died on November 26, 2017. She is pursuing the miner's claim on his behalf. Hearing Transcript at 4.

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

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

This case involves Employer's appeal of Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Granting Petition for Modification in a Subsequent Claim (2018-BLA-05019), rendered on an initial miner's claim filed on June 11, 2013,² pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). It is before the Benefits Review Board on remand from the United States Court of Appeals for the Fourth Circuit.

In his September 12, 2019 decision, which is the subject of this appeal, the ALJ credited the Miner with 12.61 years of coal mine employment³ and accepted Employer's stipulation that the Miner had clinical pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.203, 718.204(b)(2). The ALJ also found Claimant established the existence of legal pneumoconiosis and that the Miner's totally disabling impairment was due to clinical and legal pneumoconiosis. Thus, he found Claimant established modification based on a change in condition, 20 C.F.R. §725.310, and awarded benefits. Employer appealed to the Board, challenging the ALJ's legal pneumoconiosis and disability causation findings.

The Board affirmed the ALJ's finding that Claimant established legal pneumoconiosis based on Dr. Perper's opinion. *Goode v. American Energy, LLC*, BRB No. 20-0021 BLA, (Feb. 25, 2021) (unpub.). As all of the physicians agreed that the Miner was totally disabled due to chronic obstructive pulmonary disease (COPD), the Board held the only issue in the case is the etiology of the Miner's disabling COPD and whether it constituted legal pneumoconiosis. The Board determined that the ALJ applied the correct legal standard for establishing legal pneumoconiosis and rejected Employer's contention

² As the Board previously noted, ALJ Merck erroneously captioned this case as a subsequent claim. *Goode v. American Energy, LLC*, BRB No. 20-0021 BLA, slip op. at 2 n.2 (Feb. 25, 2021) (unpub.).

³ The Board previously held that because Claimant conceded the Miner had fewer than fifteen years of coal mine employment, she cannot 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); 20 C.F.R. §718.305; *see Goode*, BRB No. 20-0021 BLA, slip op. at 2 n.3.

that he erroneously conflated the legal standards for legal pneumoconiosis and disability causation. Thus, the Board affirmed the ALJ's determination that Claimant established the Miner was totally disabled due to legal pneumoconiosis. Employer filed a timely motion for reconsideration en banc, which the Board denied. *Goode v. American Energy, LLC*, BRB No. 20-0021 BLA (May 24, 2022) (Order) (unpub.).

Employer appealed to the United States Court of Appeals for the Fourth Circuit, arguing the ALJ applied an incorrect legal standard in finding the Miner had legal pneumoconiosis and conflated the issues of legal pneumoconiosis and disability causation.⁴ The Fourth Circuit agreed with Employer that the ALJ applied the wrong standard for establishing legal pneumoconiosis and therefore vacated the Board's holding that Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis. The Fourth Circuit noted that the ALJ also concluded the Miner's clinical pneumoconiosis entitled to him to benefits and that this determination is supported by substantial evidence and in accordance with law. However, the court held that its precedent precluded it from affirming on this alternative basis that the Board did not reach. *American Energy, LLC v. Director, OWCP [Goode]*, 106 F.4th 319, 335 (4th Cir. 2024) (citing *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir. 2006)); see also *Gulf & W. Indus. v. Ling*, 176 F.3d 226 (4th Cir. 1999) (explaining that under *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454 (1943), "we look exclusively to the grounds relied upon by the [Board]"). Thus, the Fourth Circuit remanded the case to the Board.

Claimant contends that on remand from the Fourth Circuit, the Board must either (1) remand the case to the ALJ to reconsider his legal pneumoconiosis findings in accordance with the Fourth Circuit's opinion, or (2) review the ALJ's clinical pneumoconiosis and total disability due to clinical pneumoconiosis findings and affirm them based on the Fourth Circuit's "roadmap." Claimant's Brief at 2. She urges the Board to pursue the second option. *Id.* Employer responds, arguing that the Board must remand the case to the ALJ to reconsider his findings at legal pneumoconiosis, as the ALJ's disability causation analysis is based primarily on those findings and there is no independent determination that clinical pneumoconiosis substantially contributed to the Miner's totally disabling respiratory impairment. The Director, Office of Workers' Compensation Programs, has not filed a response.

⁴ The Fourth Circuit held that it did not need to reach whether the ALJ conflated the issues of legal pneumoconiosis and disability causation because the legal pneumoconiosis legal standard issue was dispositive. *American Energy, LLC v. Director, OWCP [Goode]*, 106 F.4th 319, 330 (4th Cir. 2024).

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. 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).

Without the benefit of any statutory presumptions,⁵ 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. 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 (1986) (en banc).

As the Fourth Circuit determined, “while the ALJ’s legal pneumoconiosis findings cannot support the award of benefits due to the application of an improper legal standard, the ALJ’s clinical pneumoconiosis findings – which are not infected by the legal error – can.” *Goode*, 106 F.4th at 335. Thus, we agree with Claimant that under *Goode* the Board must review the ALJ’s total disability due to clinical pneumoconiosis findings, as they formed a basis for the award of benefits that the Board previously declined to consider.

Total Disability Causation – Clinical Pneumoconiosis

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); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003). As the Fourth Circuit indicated, because each physician identified the Miner’s chronic obstructive pulmonary disease (COPD) as totally disabling and did not identify any other contributing condition, Claimant can satisfy the disability causation element by establishing that the Miner’s clinical pneumoconiosis

⁵ As the ALJ found, there is no evidence of complicated pneumoconiosis; therefore, Claimant cannot 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; Decision and Order at 18.

arising out of coal mine employment substantially contributed to his COPD. *Goode*, 106 F.4th at 335.

The ALJ considered the medical opinions of Drs. Johnson, Perper, Cordasco, Copley, Fino, Sargent, and McSharry. When the case was initially before the Board, Employer argued that the ALJ erred in crediting Dr. Perper's opinion as supporting a finding of disability causation because, Employer asserted, he did not offer an opinion on this element of entitlement. Employer's Initial Brief before the Board at 13. In addition, Employer contended the ALJ erred in crediting the opinions of Drs. Johnson, Cordasco, and Copley because, according to Employer, they focused on disability causation due to legal pneumoconiosis and did not opine that the Miner's clinical pneumoconiosis substantially contributed to his disabling respiratory impairment. *Id.* We reject Employer's arguments.

Dr. Perper conducted a review of medical records and diagnosed clinical pneumoconiosis based on the Miner's occupational history and autopsy findings, including a review of the autopsy slides. Claimant's Exhibit 14 at 41. As the ALJ noted, Dr. Perper stated that the Miner's coal mine work "placed him at a particular risk for pneumoconiosis because it included mostly coal rock drilling, that results in an increased concentration of silica in the airborne coal dust" resulting in the development of the "silicosis type of simple coal workers' pneumoconiosis, a more severe type of pneumoconiosis than the common fibro-anthracotic type." *Id.*; Decision and Order at 20. Thus, Dr. Perper concluded that "at least in part the significant silicosis was responsible for the [Miner's] clinical symptoms and pulmonary dysfunction."⁶ Claimant's Exhibit 14 at 41. Further, the Fourth Circuit stated that "beyond the evidence the ALJ mentioned, Dr. Perper recognized that [the Miner's] pulmonary function did not improve with bronchodilators, a treatment known to improve pulmonary function in those with smoking-related respiratory impairments." *Goode*, 106 F.4th at 335.

Thus, we hold the ALJ permissibly gave "great weight" to Dr. Perper's disability causation opinion because he examined the Miner's lung tissue and found his opinion is

⁶ Employer initially argued before the Board that the ALJ "failed to note . . . that Dr. Perper did not opine on the issue of disability causation." Employer's Initial Brief before the Board at 13. However, as the ALJ found, it is clear Dr. Perper believed the Miner's clinical pneumoconiosis – silicosis on a background of fibrosis and emphysema – contributed to his obstructive pulmonary impairment, which Employer concedes was totally disabling. Decision and Order at 20, 22; *see* Claimant's Exhibit 14 at 41. Thus, we reject Employer's assertion that Dr. Perper's opinion is insufficient to support Claimant's burden to establish total disability due to clinical pneumoconiosis.

well-documented and well-reasoned as it is supported by the evidence of record and the medical studies he cited. *Harman Mining Co. v. Director, OWCP* [Looney], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order at 20; see *Goode*, 106 F.4th at 335.

Drs. Cordasco and Copley observed the presence of small opacities in all lung zones on the x-rays conducted in conjunction with their examinations. Claimant's Exhibits 4⁷ at 3, 5 at 2. Dr. Cordasco diagnosed clinical pneumoconiosis based on the Miner's coal mine employment history, respiratory symptoms, and objective testing. Claimant's Exhibit 4 at 3. He indicated tobacco exposure was the "main culprit" of the Miner's totally disabling respiratory impairment but also acknowledged the additive effect of both tobacco and coal dust exposure. *Id.* at 4. Dr. Copley similarly diagnosed clinical pneumoconiosis based on the Miner's symptoms and the objective testing. Claimant's Exhibit 5 at 2. He noted the Miner had "significant tobacco exposure" but found coal and rock dust also "significantly contributed to his current medical problems." *Id.* at 3.

The ALJ found that although neither physician reviewed the pathological findings, "their opinions are well supported by the pathological evidence." Decision and Order at 20. Contrary to Employer's contentions, the ALJ permissibly found their opinions consistent with Dr. Perper's well-documented and well-reasoned conclusions.⁸ *Id.* at 22; see *Looney*, 678 F.3d at 316-17; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Employer's Initial Brief before the Board at 13.

Drs. Fino, Sargent, and McSharry each diagnosed clinical pneumoconiosis but opined the Miner's totally disabling COPD was due solely to tobacco smoke and unrelated to coal workers' pneumoconiosis. Employer's Exhibits 1, 9, 12, 22-24. The ALJ permissibly found that Dr. Fino did not adequately explain how, even though he acknowledged the Miner had simple coal workers' pneumoconiosis, "[t]he severity of obstruction, blood gas results over time, and the overall rapid decline . . . from a pulmonary

⁷ Dr. Cordasco's medical evaluation was also submitted as Employer's Exhibit 3.

⁸ We agree with Employer's argument that Dr. Johnson's opinion does not necessarily aid Claimant in establishing disability causation based on clinical pneumoconiosis. See Employer's Initial Brief before the Board at 13. Although Dr. Johnson diagnosed clinical pneumoconiosis, he based his disability causation opinion primarily on legal pneumoconiosis. Director's Exhibit 9 at 26. Any error by the ALJ in weighing Dr. Johnson's opinion is harmless, however, given our affirmance of the ALJ's finding that Dr. Perper's diagnosis is the most credible of record and is entitled to the greatest weight. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

standpoint point[ed] to a smoking-related abnormality.” Employer’s Exhibit 12 at 7-8; *Looney*, 678 F.3d at 316-17; *see also* Employer’s Exhibit 24. In addition, the ALJ permissibly discredited Dr. Sargent’s opinion based on his characterization of the Miner’s 12.61 years of coal mine employment as “relatively light dust exposure,” especially given that Dr. Sargent did not discuss the Miner’s work in drilling operations or as a roof bolter which, according to studies cited by Dr. Perper, are jobs that expose miners to increased concentrations of coal mine dust. Employer’s Exhibit 22 at 2; *see Looney*, 678 F.3d at 316-17; Decision and Order at 21. Finally, the ALJ permissibly concluded that Dr. McSharry’s disability causation opinion was entitled to less weight because the doctor characterized the Miner’s smoking history as heavy in his final years, contrary to the ALJ’s determination that the Miner stopped smoking for approximately four of the last eight years of his life and then smoked only a half a pack per day when he began smoking again in 2013. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (ALJ may reject medical opinions that rely on an inaccurate smoking history); Decision and Order at 22; Employer’s Exhibit 23 at 2.

The Board is not empowered to engage in a *de novo* review of the evidence but is limited to reviewing the ALJ’s decision for errors of law and determining whether his factual findings are supported by substantial evidence. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322 (4th Cir. 2013). We conclude, consistent with the Fourth Circuit’s discussion of the evidence,⁹ that the ALJ acted within his discretion in

⁹ The Fourth Circuit explained:

[T]he ALJ noted that Dr. Perper acknowledged some medical evidence did not reveal whether coal dust or smoking caused [the Miner’s] lung disease. And beyond the evidence the ALJ mentioned, Dr. Perper recognized that [the Miner’s] pulmonary function did not improve with bronchodilators, a treatment known to improve pulmonary function in those with smoking-related respiratory impairments. Finally, the ALJ found that, in the face of this and other evidence, [Employer’s] experts did not persuasively explain why coal dust had no part in causing [the Miner’s] lung disease. This evidence sufficiently supports the ALJ’s express finding that [the Miner’s] clinical pneumoconiosis was a *substantially contributing cause* of his total disability.

Goode, 106 F.4th at 335 (emphasis added). Thus, contrary to our dissenting colleague’s assertion that it is not clear whether the ALJ found clinical pneumoconiosis was a substantially contributing cause of the Miner’s totally disabling respiratory or pulmonary impairment, the evidence, as the Fourth Circuit recognized, supports the ALJ’s finding that

determining the credibility of the conflicting evidence. Substantial evidence supports the ALJ's conclusion that Claimant established the Miner was totally disabled due to clinical pneumoconiosis.¹⁰ *Compton*, 211 F.3d at 211; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); Decision and Order at 20-22; *see Goode*, 106 F.4th at 335.

Accordingly, the ALJ's Decision and Order Granting Petition for Modification in a Subsequent Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's finding that Claimant's totally disabling respiratory impairment is due to clinical pneumoconiosis. In reaching his conclusions concerning total disability causation, the ALJ stated: "I find the evidence establishes that the Miner's pneumoconiosis, both legal *and* clinical, was a substantially contributing cause to the Miner's disability." Decision and Order at 22 (emphasis added). Thus, it is not clear whether the ALJ found clinical pneumoconiosis was a substantially contributing cause of the Miner's totally disabling respiratory of pulmonary impairment independent of legal pneumoconiosis as he combined his discussion of the two causes when making his determinations. *See* Decision and Order at

the Miner's clinical pneumoconiosis was a substantially contributing cause of his total disability.

¹⁰ Because the ALJ provided a valid reason for discrediting the opinions of Drs. Fino, Sargent, and McSharry on total disability causation, we need not address all of the reasons he provided for giving less weight to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

18-22. As fact finding rests with the authority of the ALJ, not the Board, remand is the proper action in this case. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-112, 1-113 (1989); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (“When the [fact-finder] fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . rather than attempting to fill the gaps in [his] opinion.”). On remand, because the Section 411(c)(4) presumption does not apply in this case, the burden of proof rests with Claimant to establish all necessary elements of entitlement.

JUDITH S. BOGGS
Administrative Appeals Judge