BRB No. 23-0445 BLA

RAY JOHNSON Claimant-Respondent v. RACHEAL MINING COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 03/12/2025 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Amanda Torres (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order on Remand Awarding Benefits (2016-BLA-05119) rendered on a subsequent claim filed on March 2, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The case is before the Benefits Review Board for the second time.

In his previous Decision and Order Awarding Benefits, the ALJ determined Racheal Mining Company, Incorporated (Racheal Mining), is the properly designated responsible operator. He credited Claimant with 14.63 years of 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, but not clinical pneumoconiosis,[3] and thus established a change in an applicable condition of entitlement.[4] 20 C.F.R §§718.202(a), 725.309(c). He further found Claimant established

[1] This is Claimant's fourth claim for benefits. ALJ Christine L. Kirby denied the most recent prior claim because Claimant failed to establish pneumoconiosis. 20 C.F.R. §718.201; Director's Exhibit 3. Claimant took no further action until filing the current claim. Director's Exhibit 5.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption 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.

[3] "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). "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).

[4] When 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 he 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); *see 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.

total disability due to legal pneumoconiosis. 20 C.F.R §718.204(b)(2), (c). Thus, he awarded benefits.

In consideration of Employer's appeal, the Board rejected Employer's arguments that the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution and that the removal provisions applicable to the ALJ rendered his appointment unconstitutional.[5] *Johnson v. Racheal Mining Co.*, BRB No. 20-0289 BLA, slip op. at 3-7 (Oct. 29, 2021) (unpub.). The Board also rejected Employer's argument that the ALJ erred by finding two coal mine operators that employed Claimant after Racheal Mining—DBH Coal Company, Incorporated (DBH Coal) and DM&M Coal Company, Incorporated (DM&M Coal)—did not have a successor-operator relationship. *Id.* at 9.

The Board held, however, that the ALJ erred by failing to consider relevant evidence regarding the length of Claimant's employment relationships with DBH Coal and DM&M Coal. *Johnson*, BRB No. 20-0289 BLA, slip op. at 11-12. It therefore vacated the ALJ's responsible operator determination and remanded the case for him to reconsider the length of Claimant's employment with DBH Coal and DM&M Coal. On the merits of entitlement, the Board affirmed the ALJ's findings that Claimant established 14.63 years of coal mine employment and total disability but vacated his findings that Claimant established legal pneumoconiosis, total disability due to pneumoconiosis, and a change in an applicable condition of entitlement. *Id.* at 15-16. Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id.* at 16-17.

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§725.309(c)(3). Because Claimant did not establish pneumoconiosis in his prior claim, he had to submit new evidence establishing that element of entitlement to obtain review of the claim on the merits. *See* 20 C.F.R. §725.309(c)(3); *White*, 23 BLR at 1-3; Director's Exhibit 3.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, §2, cl. 2.

On remand, the ALJ found neither DBH Coal nor DM&M Coal employed Claimant for at least one year and thus again determined Racheal Coal is the properly designated responsible operator. On the merits of entitlement, he again found Claimant established legal pneumoconiosis, a change in an applicable condition of entitlement, and legal pneumoconiosis is a substantially contributing cause of Claimant's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a)(4), 718.204(c), 725.309. Thus, he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Racheal Coal is the responsible operator and that Claimant established legal pneumoconiosis. Claimant has not filed a response brief. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging rejection of Employer's responsible operator arguments.

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.[6] 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, 361-62 (1965).

Responsible Operator

The responsible operator is the "potentially liable operator" that most recently employed the miner. 20 C.F.R. §725.495(a)(1).[7] Once the district director identifies a potentially liable operator, that operator may be relieved of liability only if it proves it is financially incapable of assuming liability for benefits or another operator more recently

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3 at 124; 23 at 9-10, 12, 16-17.

[7] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c).

On appeal, Employer makes three arguments related to Racheal Coal's designation as the responsible operator: 1) the Board's instructions to the ALJ on remand were incomplete; 2) the ALJ and the Board overlooked whether DM&M Coal and DBH Coal were the same entity; and 3) the ALJ mischaracterized the record and irrationally concluded that Claimant's testimony about his work at DBH and DM&M was "inconsistent and unsupported by documentation." Employer's Brief at 12-21. We address each of these arguments in turn.

Completeness of the Board's Remand Instructions

Employer argues that the Board's instructions on remand were incomplete because they erroneously failed to instruct the ALJ to address its argument that Spud Mining, Incorporated (Spud Mining), rather than Racheal Coal, should have been found responsible for the payment of benefits. Employer's Brief at 12-13. As the Director correctly asserts, however, the Board previously held Employer forfeited this argument because it failed to raise it in its opening brief. *Johnson*, BRB No. 20-0289 BLA, slip op. at 11 n.16 ("Employer argues in its Reply Brief that Claimant's 'recent work for Spud Mining makes Spud the proper responsible operator.' Employer has forfeited this argument by failing to raise it in its opening brief."); Director's Response Brief at 3-4 (unpaginated). We thus reject Employer's argument.

DM&M and DBH as One Entity

Employer argues that both the Board and the ALJ, on remand, overlooked that DM&M Coal and DBH Coal were a singular entity for the purposes of determining if it was properly designated as the responsible operator. Employer's Brief at 16-19. However, as the Director correctly asserts, the ALJ was not tasked on remand with determining whether DM&M Coal and DBH Coal were a singular entity, as the Board had already affirmed the ALJ's determination that DM&M Coal and DBH Coal were separate entities. Director's Response Brief at 4-5 (unpaginated) (citing *Johnson*, BRB No. 20-0289 BLA, slip op. at 8). The Board previously rejected Employer's arguments, and those holdings are now the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Johnson*, BRB No. 20-0289, slip op. at 9. Employer has provided no argument that the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine; thus, we decline to disturb the Board's prior disposition. *See Sammons v. Wolf Creek Collieries*, 19 BLR 1-24, 1-28 n.3 (1994); *Brinkley*, 14 BLR at 1-150-51.

Claimant's Testimony

Employer asserts Claimant's deposition testimony and testimony from his prior claims establish he was employed by DM&M Coal and DBH Coal for at least one calendar year and that the ALJ erred in finding his testimony on the liability issue was "inconsistent and unsupported by documentation." Employer's Brief at 13-16. The Director responds that the ALJ's determination was within his discretion and supported by substantial evidence. Director's Response Brief at 7-8 (unpaginated). We agree with the Director's argument.

As the ALJ observed, while Claimant has consistently reported twenty-three years of coal mine employment, he has provided inconsistent statements and testimony concerning his employment with DM&M Coal and DBH Coal. Decision and Order on Remand at 3-6; *see* Director's Exhibits 2 at 143-44, 412-19; 3 at 133-43, 603; 23 at 10-18. Those statements and testimony are further not supported by the testimony of the Claimant's wife or documentary evidence such as the Social Security Administration earnings records. Decision and Order on Remand at 3-6; *see* Director's Exhibits 1 at 114; 2 at 436; 3 at 8-9, 606-09, 631, 804-08; 6; 8; 9; 21 at 3-5. The ALJ's finding that Claimant's testimony is "inconsistent and unsupported by documentation" is thus supported by substantial evidence, as the ALJ rationally identified inconsistencies within the record in support of his findings and weighed Claimant's testimony accordingly. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); Director's Response Brief at 7-8 (unpaginated); Decision and Order on Remand at 3-6; *see also Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable). We thus affirm the ALJ's finding that Claimant's testimony concerning his employment with DM&M Coal and DBH Coal is entitled to little weight.[8] Decision and Order at 6.

Therefore, as Employer has identified no basis to disturb the ALJ's responsible operator finding, we affirm it.

[8] We therefore need not address the Director's argument that the ALJ erred by considering Claimant's testimony or Employer's assertion that the Director forfeited the argument. Director's Response Brief at 5 (unpaginated); Employer's Reply Brief at 3-4.

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. 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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an 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 Court of Appeals for the Sixth Circuit holds that 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." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinion of Dr. Forehand,[9] who opined that due to the effects of inhaling coal mine dust Claimant experienced a fibrotic reaction, which Dr. Forehand described as "coal workers' pneumoconiosis" as well as "scarring around the bronchovascular bundles in his lungs" causing arterial hypoxemia. Decision and Order on Remand at 6-8; Director's Exhibit 15 at 17. The ALJ found Dr Forehand's opinion contains two separate diagnoses, one of clinical pneumoconiosis in the form of a fibrotic reaction, and a second diagnosis of legal pneumoconiosis in the form of scarring around the bronchovascular bundles in his lungs causing arterial hypoxemia. Decision and Order on Remand at 8; Director's Exhibit 15 at 17. Crediting Dr. Forehand's opinion as well-reasoned and documented, the ALJ found Claimant established legal pneumoconiosis. Decision and Order on Remand at 8.

[9] The Board previously affirmed the ALJ's discrediting of Dr. Castle's opinion that Claimant does not have legal pneumoconiosis. *Johnson*, BRB No. 20-0289, slip op. at 13-14. It further affirmed his finding that Dr. Dahhan did not address whether Claimant has legal pneumoconiosis. *Id.* at 13 n.23.

Employer contends the ALJ erred in finding Dr. Forehand diagnosed legal pneumoconiosis. Employer's Brief at 20-21. We disagree.

Initially, we reject Employer's assertion that the ALJ erred in crediting Dr. Forehand's opinion because he based his diagnoses solely on the x-ray evidence, which the ALJ determined did not establish clinical pneumoconiosis. Employer's Brief at 20. Rather, the ALJ permissibly found Dr. Forehand based his diagnosis of legal pneumoconiosis on his physical examination as well as Claimant's bronchovascular scarring, disabling arterial hypoxemia, history of exposure to coal mine dust and cigarette smoke, and medical history.[10] *See 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); Decision and Order on Remand at 8; Director's Exhibit 15 at 15-17.

Further, contrary to Employer's contention, the ALJ did not "exceed[ ] the record" or substitute his opinion for that of a physician in finding Dr. Forehand diagnosed legal pneumoconiosis. Employer's Brief at 20-21. As the ALJ explained, Dr. Forehand opined Claimant has "both clinical pneumoconiosis, i.e., 'a fibrotic reaction (coal workers' pneumoconiosis),' and legal pneumoconiosis, i.e., 'scarring around the bronchovascular bundles in his lungs, interfering with oxygen transfer through the lungs into [C]laimant's body and leading to arterial hypoxemia.'" Decision and Order on Remand at 8 (quoting Director's Exhibit 15 at 17) (emphasis omitted). The ALJ further permissibly found Dr. Forehand adequately explained his conclusion that the scarring seen around the bronchovascular bundles in Claimant's lungs which caused arterial hypoxemia was due to not just Claimant's history of cigarette smoke exposure but also his coal mine dust exposure. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order on Remand at 8; Director's Exhibit 15 at 15-17.

Fact-finding, including drawing inferences from a medical opinion, is the purview of the ALJ. The Board cannot reweigh the evidence or disturb factual findings that are supported by substantial evidence, even if it might reach a different conclusion if it were reviewing the evidence de novo. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 398 (6th Cir. 2019) (quoting *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 486 (6th Cir. 1985)); *Anderson*, 12 BLR at 1-113. The ALJ's finding is supported by substantial evidence. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *see also Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is

[10] The ALJ noted Dr. Forehand further acknowledged Claimant's history of cigarette smoke exposure and concluded that, while it contributed to his respiratory impairment, it did not negate the history of exposure to coal mine dust. Decision and Order on Remand at 8; Director's Exhibit 15 at 16-17.

defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion). We thus affirm the ALJ's findings that Dr. Forehand's opinion supports a finding of legal pneumoconiosis, that Claimant established legal pneumoconiosis, and that Claimant established a change in an applicable condition of entitlement. *See* 20 C.F.R. §§718.204(b)(2), 725.309(c).

Disability Causation

Employer does not specifically challenge the ALJ's finding that Claimant established disability causation. We therefore affirm his finding that Claimant established that legal pneumoconiosis substantially contributes to his totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 9.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge