

U.S. Department of Labor

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



BRB No. 21-0021 BLA

CARROLL K. RUNYON, JR.)
(o/b/o the Estate of CARROLL RUNYON))

Claimant-Respondent)

v.)

ISLAND CREEK COAL COMPANY)

DATE ISSUED: 11/04/2022

Employer-Petitioner)

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 Awarding Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

ROLFE and GRESH, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order on Remand Awarding Benefits (2012-BLA-06010) rendered on a miner's

subsequent claim filed on May 24, 2011,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.²

The ALJ initially awarded the Miner³ benefits in an August 22, 2017 Decision and Order Awarding Benefits. The ALJ accepted the parties' stipulation that the Miner had fourteen years of coal mine employment, and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.⁴ 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Considering whether Claimant could establish entitlement at 20 C.F.R. Part 718, the ALJ found he established the Miner was totally disabled due to legal pneumoconiosis,⁵ and therefore established a change in an applicable condition of entitlement.⁶ 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), 718.204(c), 725.309. Accordingly, the ALJ awarded benefits.

¹ The Miner filed four prior claims, all of which were finally denied. Director's Exhibits 1-3. The district director finally denied the Miner's most recent prior claim on December 2, 2005 for failure to establish total disability. Director's Exhibit 3.

² Pursuant to Claimant's request, the Board dismissed Claimant's cross-appeal. *Runyon v. Island Creek Coal Co., LLC*, BRB No. 21-0021 BLA-A (Mar. 23, 2021) (Order) (unpub.).

³ Claimant is the son of the Miner, who died on July 27, 2014, and is pursuing the claim on behalf of the Miner's estate. [ALJ] Order Granting Substitution of Party of Record [February 2, 2016].

⁴ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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); *see* 20 C.F.R. §718.305.

⁵ "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).

⁶ Where a claimant 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); *White*

Pursuant to Employer's appeal, the Board affirmed the ALJ's determination that the Miner was totally disabled, and therefore established a change in an applicable condition of entitlement. *Runyon v. Island Creek Coal Co.*, BRB No. 17-0681 BLA, slip op. at 3, n. 4 (Aug. 30, 2019) (unpub.). However, the Board vacated the ALJ's determinations that Claimant established the Miner had legal pneumoconiosis and was totally disabled due to legal pneumoconiosis,⁷ and remanded the case for the ALJ to reconsider the medical opinions on those issues. *Id.* at 6-7.

On remand, the ALJ again found Claimant established the Miner had legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2); 718.202(a)(4). She further found the Miner's totally disabling respiratory impairment was due to legal pneumoconiosis, and awarded benefits. 20 C.F.R. §718.204(c).

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response. Employer filed a reply brief reiterating its arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in

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. §725.309(c)(3). Because the Miner's prior claim was denied for failure to establish total disability, Claimant had to submit new evidence establishing this element of entitlement to obtain review of the Miner's current claim on the merits. 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Director's Exhibit 3.

⁷ The Board held that the ALJ did not adequately explain why she credited Drs. Rasmussen's and Cohen's opinions that the Miner had legal pneumoconiosis, and that she mischaracterized Dr. Zaldivar's contrary opinion when she weighed it. *Runyon v. Island Creek Coal Co.*, BRB No. 17-0681 BLA, slip op. at 5-6 (Aug. 30, 2019) (unpub.). Additionally, the Board held that the ALJ applied an erroneous legal standard when she found Claimant established the Miner was totally disabled due to pneumoconiosis. *Id.* at 6-7.

accordance with applicable law.⁸ 30 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 (1965).

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions,⁹ 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,¹⁰ 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). The United States Court of Appeals for the Sixth Circuit has held that a miner can satisfy this burden by showing that the disease was caused “in part” by coal mine dust exposure. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (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.’”).

Pursuant to the Board’s instructions, the ALJ reconsidered the opinions of Drs. Rasmussen, Cohen, and Zaldivar.¹¹ Decision and Order on Remand at 4-7; *Runyon*, BRB

⁸ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 1, 6.

⁹ Because there was no evidence of complicated pneumoconiosis, the ALJ found Claimant could not invoke the irrebutable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. Decision and Order at 22; 30 U.S.C. §921(c)(3)(2018); 20 C.F.R. §718.304.

¹⁰ The ALJ found Claimant did not establish the Miner had clinical pneumoconiosis. Decision and Order at 25.

¹¹ The Board affirmed the ALJ’s determination that Dr. Fino’s opinion that the Miner did not have legal pneumoconiosis was not well-reasoned or documented. *Runyon*, BRB No. 17-0681 BLA, slip op. at 4. On appeal, Employer again argues the ALJ erred in

No. 17-0681 BLA, slip op. at 3-6. Drs. Rasmussen and Cohen opined the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 11; Claimant's Exhibit 1. Dr. Zaldivar opined the Miner did not have legal pneumoconiosis, but instead had a respiratory impairment due to asthma and smoking. Employer's Exhibit 3. The ALJ accorded the opinions of Drs. Rasmussen and Cohen significant weight, finding them well-reasoned and documented. Decision and Order on Remand at 7. Conversely, she accorded little weight to Dr. Zaldivar's opinion because she found it was not well-reasoned or consistent with the other evidence of record. *Id.* at 6.

Employer contends the ALJ erred in her weighing of the medical opinion evidence. Employer's Brief at 12-24, 28-36. We disagree.

Dr. Rasmussen diagnosed COPD/emphysema based upon his examination of the Miner, the Miner's reported symptoms, and the results of his objective testing. Decision and Order on Remand at 6, Director's Exhibit 11. He attributed the Miner's obstructive impairment to coal mine dust exposure and cigarette smoking, explaining they cause identical forms of emphysema and are impossible to distinguish from one another. *Id.* Similarly, Dr. Cohen, who reviewed the medical evidence, stated it was not possible to distinguish the relative contribution of smoking and coal dust exposure as they cause the same pattern of impairment, but also specifically opined that the Miner's coal mine dust exposure contributed to his impairment. Decision and Order on Remand at 7; Claimant's Exhibit 1 at 10.

Contrary to Employer's arguments, the ALJ permissibly credited the opinions of Drs. Rasmussen and Cohen because she found they were based on premises consistent with scientific studies the Department of Labor (DOL) found credible, concluding that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms and that the effects of both exposures are additive. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order on Remand at 7; Employer's Brief at 14-18. The ALJ further permissibly found their opinions well-documented, reasoned, and supported by the valid objective testing, the findings on physical examination and the Miner's reported symptoms. *See Jericol Mining, Inc. v.*

discrediting Dr. Fino's opinion. Employer's Brief at 28-36. However, as Employer has not attempted to show the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to reconsider our holding on this issue. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

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 7.

We further reject Employer's argument that the ALJ erred in crediting Dr. Rasmussen's opinion despite his reliance on an inaccurate length of coal mine employment history for the Miner. Employer's Brief at 23-24. 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 Huscoal, Inc., v. Dir., OWCP [Clemons]*, 48 F.4th 480, 491 (6th Cir. Sept. 7, 2022); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993). Here, the ALJ acknowledged Dr. Rasmussen relied on a twenty-three year history of coal mine employment for the Miner to diagnose legal pneumoconiosis, but permissibly found his reliance on an inflated length of coal mine employment did not significantly affect the reliability of his opinion based on the "substantial objective findings" the physician relied on in forming his opinion. *See Clemons*, 48 F.4th at 491; *Napier*, 301 F.3d at 713-14; *Trumbo*, 17 BLR at 1-89; *Sellards*, 17 BLR at 1-80-81; Decision and Order on Remand at 7. Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Rasmussen's opinion was well-documented and reasoned. Decision and Order on Remand at 7.

Finally, we reject Employer's argument that the ALJ erred in her consideration of Dr. Zaldivar's opinion. Employer's Brief at 28-35. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crisp*, 866 F.2d at 185. Here, Dr. Zaldivar attributed the Miner's impairment primarily to asthma, unrelated to his coal mine dust exposure. Decision and Order on Remand at 5; Employer's Exhibits 3, 8. He relied on the Miner's self-reported history of asthma, a history of wheezing and other respiratory symptoms, and variability in the Miner's pulmonary function studies over time. *Id.* However, as the ALJ found, the Miner's self-reported diagnosis of asthma consisted of a single statement from him in 1987 and asthma was not mentioned again in his medical records during the remaining twenty-seven years of his life. Decision and Order on Remand at 5; Employer's Exhibits 3, 8. Moreover, as the ALJ noted, Dr. Zaldivar described the Miner's symptoms as not specific to any cause and opined they could be consistent with a cardiac or respiratory disease. Decision and Order on Remand at 5; Employer's Exhibit 8 at 7.

The ALJ permissibly found Dr. Zaldivar's diagnosis of asthma was not adequately explained in light of the Miner's single reported mention of asthma in 1987 and non-specific symptoms. *See Banks*, 690 F.3d at 489; *Crisp*, 866 F.2d at 185; Decision and Order on Remand at 5. Furthermore, the ALJ permissibly found his opinion was called into question by Dr. Cohen's well-reasoned and documented opinion that the Miner's pulmonary function studies do not support a diagnosis of asthma, as only a single study in

2002 showed a significant response to bronchodilators, and by Dr. Rasmussen's opinion that the Miner's impairment was irreversible. *See Banks*, 690 F.3d at 489; *Crisp*, 866 F.2d at 185; Decision and Order on Remand at 5; Claimant's Exhibit 1 at 16; Director's Exhibit 11. As Dr. Zaldivar's opinion that the Miner did not have legal pneumoconiosis "was almost entirely premised on the asthma diagnosis," the ALJ permissibly found his opinion entitled to little weight. *See Banks*, 690 F.3d at 489; *Crisp*, 866 F.2d at 185; Decision and Order on Remand at 5.

Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that the opinions of Drs. Rasmussen and Cohen establish the Miner had legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Banks*, 690 F.3d at 489; *Crisp*, 866 F.2d at 185; *Napier*, 301 F.3d at 712-14; Decision and Order on Remand at 7.

Disability Causation

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). 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).

The ALJ credited the opinions of Drs. Rasmussen and Cohen that the Miner's legal pneumoconiosis was a significant contributory cause of his totally disabling respiratory impairment. Decision and Order on Remand at 9. Conversely, the ALJ discredited the opinions of Drs. Zaldivar and Fino that the Miner's totally disabling respiratory impairment was not due to pneumoconiosis, as they failed to diagnose legal pneumoconiosis. *Id.* at 9-10.

Employer contends the ALJ erred in her weighing of the medical opinions on disability causation. Employer's Brief at 36-40. We disagree.

As discussed above, the ALJ permissibly relied on the opinions of Drs. Rasmussen and Cohen in finding the Miner's disabling COPD/emphysema constituted legal pneumoconiosis. Decision and Order on Remand at 7. We therefore see no error in the ALJ finding their opinions also sufficient to establish the Miner's legal pneumoconiosis was 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 Cnty. Coal Co., 25 BLR 1-249, 1-255-57 (2019); Decision and Order on Remand at 9-10.

Additionally, the ALJ permissibly discounted the opinions of Drs. Zaldivar and Fino on the cause of the Miner's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that legal pneumoconiosis was established. See *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), *vacated sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995); Decision and Order Remand at 9-10. As substantial evidence supports the ALJ's finding Claimant is totally disabled due to legal pneumoconiosis, we affirm it and therefore the award of benefits. 20 C.F.R. §718.204(c).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge