



BRB Nos. 21-0401 BLA
and 21-0402 BLA

DEBRA D. MOORE)
(o/b/o and Widow of WILLIAM EDWARD)
MOORE))

Claimant-Respondent)

v.)

KROLICK CONTRACTING,)
INCORPORATED)

and)

STATE WORKERS' INSURANCE FUND)

Employer/Carrier-)
Petitioners)

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

Party-in-Interest)

DATE ISSUED: 10/31/2022

DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Decision and Order Awarding Benefits Under the Automatic Entitlement Provision of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Donna M. Hojo Lowman (Rulis & Bochicchio, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.
PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-06217) and Decision and Order Awarding Benefits Under the Automatic Entitlement Provision (2019-BLA-06218), rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on July 22, 2011,¹ and a survivor's claim filed on February 22, 2016.

In considering the miner's claim, the ALJ accepted the parties' stipulation that the Miner had nine years and eight months of coal mine employment, and therefore found Claimant could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.² 30 U.S.C. §921(c)(4) (2018). The ALJ also found Claimant did not establish the Miner had complicated pneumoconiosis and therefore 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) (2018); 20 C.F.R. §718.304.

Considering entitlement under 20 C.F.R. Part 718, the ALJ found the Miner was totally disabled, and that Claimant therefore demonstrated a change in an applicable condition of entitlement.³ 20 C.F.R. §§718.204(b)(2), 725.309(c). She further found the

¹ The Miner filed a prior claim for benefits on September 15, 2003, which the district director denied for failure to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. Claimant is the widow of the Miner, who died on February 2, 2016. MC Director's Exhibits 29, 32. She is pursuing the miner's claim on his behalf, along with her own survivor's claim. MC Director's Exhibit 33; SC Director's Exhibit 1.

² Section 411(c)(4) of the Act provides a rebuttable presumption that the Miner's total disability was due to pneumoconiosis if the Miner had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

³ Where a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must deny the subsequent claim unless she 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)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those

Miner was totally disabled due to legal⁴ pneumoconiosis and awarded benefits in the miner's claim. 20 C.F.R. §§718.202(a), 718.204(c). Because she determined the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).⁵

On appeal, Employer argues the ALJ erred in finding the Miner had legal pneumoconiosis and was totally disabled due to legal pneumoconiosis, and thus erred in awarding benefits in both claims.⁶ Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.⁷ 33 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).

conditions upon which the prior denial was based.” 20 C.F.R. §725.309(c)(3). Because the Miner did not establish any element of entitlement in his prior claim, Claimant must submit evidence establishing at least one element to obtain review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; MC Director's Exhibit 1.

⁴ “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).

⁵ Under Section 422(l) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

⁶ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established the Miner had a totally disabling respiratory impairment and simple clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19, 27.

⁷ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 4.

The Miner's Claim

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, 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, 718.204. 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, 1-2 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had a “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).

The ALJ considered the medical opinions of Drs. Prakash and Fino.⁸ Decision and Order at 25-26; 20 C.F.R. §718.202(a)(4). Dr. Prakash diagnosed the Miner with legal pneumoconiosis in the form of severe chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to coal mine dust exposure and cigarette smoking. MC Director's Exhibit 12 at 4. Dr. Fino diagnosed the Miner with severe bullous emphysema⁹ unrelated to coal mine dust exposure. MC Employer's Exhibits 1-2. The ALJ found Dr. Prakash's opinion reasoned and documented and found Dr. Fino's opinion undermined for several reasons. Decision and Order at 25-26.

Employer does not specifically contest the ALJ's crediting of Dr. Prakash's opinion diagnosing legal pneumoconiosis; instead, it generally contends Dr. Prakash was “unable

⁸ The ALJ also considered Dr. Swedarsky's pathology report which diagnosed the Miner with chronic obstructive pulmonary disease (COPD)-emphysema along with a positive smoking history, but she found Dr. Swedarsky did not provide an opinion on the etiology of the Miner's lung disease. Decision and Order at 23. Additionally, the ALJ noted diagnoses of COPD and emphysema in the Miner's treatment records but found the treating physicians did not address the etiology of those diseases. Decision and Order at 22-23; MC Director's Exhibit 11. We affirm these findings as unchallenged. *See Skrack*, 6 BLR at 1-711.

⁹ Emphysema (along with chronic bronchitis and asthma) is one of the three disease processes included in the term COPD. 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).

to assign a percentage” of the contribution of coal mine dust exposure and cigarette smoking to the Miner’s severe obstructive impairment. Employer’s Brief at 13 (unpaginated). Contrary to Employer’s argument, to diagnose legal pneumoconiosis, Dr. Prakash did not need to attribute the Miner’s COPD entirely to coal mine dust exposure, nor was he required to specifically apportion the contributions of coal mine dust exposure and smoking to the Miner’s lung disease. *See* 20 C.F.R. §718.201(b); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-107-1-108 (1998) (en banc); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (legal pneumoconiosis can be proven by a physician’s opinion that coal dust and smoking were both causal factors and it was impossible to allocate between them).

Employer does not otherwise challenge the ALJ’s findings regarding Dr. Prakash’s opinion; thus, we affirm her crediting of Dr. Prakash’s opinion diagnosing legal pneumoconiosis as reasoned and documented. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25.

Employer next contends the ALJ erred in discrediting Dr. Fino’s opinion. Employer’s Brief at 14-15 (unpaginated). We disagree. The ALJ found Dr. Fino’s opinion undermined because, in attributing the Miner’s emphysema and consequent severe obstructive impairment to cigarette smoke, Dr. Fino failed to address the medical science accepted by the Department of Labor in the preamble to the 2001 revised regulations recognizing that coal mine dust and tobacco smoke have an additive effect and affect the lungs through similar mechanisms. Decision and Order at 26; 65 Fed. Reg. 79,920, 79,939-940 (Dec. 20, 2000). Because Dr. Fino simply opined that “coal dust does not cause [bullous] emphysema,” without addressing whether the Miner’s coal mine dust exposure contributed to or aggravated the emphysema, the ALJ permissibly discredited his opinion. *See* 65 Fed. Reg. at 79,940; *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257 (3d Cir. 2011), *aff’g J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); Decision and Order at 26.

Nor did the ALJ improperly shift the burden of proof to Dr. Fino to disprove the Miner’s legal pneumoconiosis. Employer’s Brief at 15 (unpaginated). Rather, she permissibly accorded Dr. Fino’s opinion less weight because he did not adequately explain why he believed “coal dust-induced lung disease and tobacco smoke-induced lung disease are mutually-exclusive in this case.” *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 26. For these reasons, we affirm the ALJ’s finding that Dr. Fino’s opinion is not well-reasoned.¹⁰

¹⁰ Because the ALJ provided valid reasons for discrediting Dr. Fino’s opinion, we need not address Employer’s additional arguments regarding the ALJ’s discrediting of his

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163. 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 medical opinion evidence establishes the Miner had legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); Decision and Order at 26.

Disability Causation

To establish total disability due to pneumoconiosis, Claimant must prove that 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).

Employer makes the same arguments regarding disability causation as it made regarding legal pneumoconiosis. Because the ALJ permissibly found the Miner's totally disabling severe COPD *constitutes* legal pneumoconiosis, it necessarily follows that legal pneumoconiosis substantially contributed to the Miner's total disability. *See Soubik*, 366 F.3d at 234; *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 29; MC Director's Exhibit 12 at 4; MC Employer's Exhibit 1 at 9. We therefore see no error in the ALJ's decision to credit Dr. Prakash's opinion that the Miner was totally disabled due to legal pneumoconiosis.¹¹ As such, we affirm the ALJ's finding that the Miner's legal pneumoconiosis was a substantially contributing cause of his

opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 14-16 (unpaginated).

¹¹ The ALJ rationally discredited Dr. Fino's opinion on the cause of the Miner's total disability because he did not diagnose legal pneumoconiosis. Decision and Order at 28-29; *Toler v. E. Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis). Because the ALJ gave a valid reason for discrediting Dr. Fino's disability causation opinion, we need not address Employer's remaining arguments with respect to Dr. Fino. *See Kozele*, 6 BLR at 1-382 n.4.

totally disabling impairment and affirm the award of benefits in the miner's claim. 20 C.F.R. §§ 718.202, 718.204(b), (c); Decision and Order at 29-30.

The Survivor's Claim

Because we have affirmed the award in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); SC Decision and Order at 3.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Decision and Order Awarding Benefits Under the Automatic Entitlement Provision.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge