



BRB No. 19-0531 BLA

DONALD E. HOWARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENERGY COAL INCOME PARTNERSHIP	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	DATE ISSUED: 09/23/2020
PNEUMOCONIOSIS FUND	)	
	)	
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 Awarding Benefits of Peter B. Silvain, Jr.,  
Administrative Law Judge, United States Department of Labor.

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

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West  
Virginia, for Employer.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2017-BLA-05402) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (Act). This case involves a claim filed on October 6, 2014.

The administrative law judge credited Claimant with 14.68 years of coal mine employment and therefore concluded he could not 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) (2012).<sup>1</sup> Considering whether Claimant established entitlement to benefits without the benefit of this presumption, the administrative law judge found the evidence established the existence of legal pneumoconiosis,<sup>2</sup> a totally disabling respiratory impairment, and total disability due to pneumoconiosis.<sup>3</sup> 20 C.F.R. §§718.202(a)(4); 718.204(b), (c); 725.309(c). He therefore awarded benefits.

On appeal, Employer asserts the administrative law judge erred in finding Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. Claimant

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

<sup>2</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>3</sup> The administrative law judge found Claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202. Decision and Order at 22-27. He also found Claimant did not establish 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); 20 C.F.R. §718.304; Decision and Order at 29.

responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.<sup>4</sup>

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence and in accordance with applicable law.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

### **Entitlement - 20 C.F.R. Part 718**

Without the benefit of the Section 411(c)(4) presumption, 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 demonstrate he has 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 holds 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 v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

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<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established total respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 31.

<sup>5</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 30.

The administrative law judge considered the opinions of Drs. Green and Fino.<sup>6</sup> Dr. Green opined Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and smoking. Claimant's Exhibit 1 at 4. Dr. Fino opined Claimant does not have legal pneumoconiosis, but has chronic hypoxemia due to pulmonary emboli. Director's Exhibit 16 at 9-10; Employer's Exhibits 1, 11. The administrative law judge credited Dr. Green's diagnosis of legal pneumoconiosis as well-reasoned and documented, and discredited Dr. Fino's contrary opinion as inadequately supported or explained. Decision and Order at 25-28. He thus concluded Claimant established legal pneumoconiosis.

We reject Employer's argument that the administrative law judge erred in crediting Dr. Green's opinion. Employer's Brief at 12-13. Dr. Green examined Claimant and conducted a pulmonary function study, blood gas study, and electrocardiogram. Claimant's Exhibit 1. He based his legal pneumoconiosis diagnosis on Claimant's history of chronic cough, wheeze, shortness of breath, and mucus expectoration, as well his nearly fifteen years of coal mine employment. *Id.* As the administrative law judge observed, while Dr. Green stated it was "not possible to distinguish the relative contribution" of smoking and coal mine dust exposure, he specifically opined Claimant's fifteen years of respirable coal mine dust exposure, along with cigarette smoking and other factors, was a "significant contributing and aggravating factor" to his COPD, disabling hypoxemia, and shortness of breath.<sup>7</sup> *Id.* at 3-4; *see* Decision and Order at 18, 25. Contrary to Employer's argument, the administrative law judge permissibly credited Dr. Green's opinion as consistent with the Department of Labor's recognition that the risks of smoking and coal dust exposure are additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett*

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<sup>6</sup> The administrative law judge also considered the opinions of Drs. Forehand and Raj, diagnosing legal pneumoconiosis. We need not address Employer's arguments regarding their opinions as the administrative law judge found they relied on inaccurate smoking histories and thus did not accord them any weight. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 24-26; Employer's Brief at 11-12; Director's Exhibit 10; Claimant's Exhibit 2.

<sup>7</sup> Contrary to Employer's inference, Dr. Green did not opine that the effects of coal mine dust exposure and cigarette smoking are identical. Employer's Brief at 13. He stated the relative contribution of each could not be distinguished, but nevertheless identified coal mine dust exposure as a "significant contributing and aggravating factor." Claimant's Exhibit at 3-4. The administrative law judge accurately characterized Dr. Green's opinion. *See* Decision and Order at 18, 25.

*Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 25.

Nor is there merit to Employer's assertion that Dr. Green's opinion lacks credibility because he made "no attempt to differentiate the contribution of claimant's exposure to coal dust, smoking history, obesity, and chronic pulmonary embolism to his pulmonary condition." Employer's Brief at 12. A physician need not apportion a specific percentage of a miner's lung disease to coal mine dust as opposed to cigarette smoke to establish the existence of legal pneumoconiosis. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them); see also *Groves*, 761 F.3d at 598-99. Thus, we affirm the administrative law judge's determination to assign Dr. Green's opinion "full probative weight" as supported by substantial evidence. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 25, 27.

We also reject Employer's argument the administrative law judge erred in discrediting Dr. Fino's opinion. Employer's Brief at 13-16. Dr. Fino diagnosed a gas exchange impairment, but stated Claimant's normal diffusing capacity "rules out" coal dust as a cause of that impairment.<sup>8</sup> Employer's Exhibit 1. Rather, he attributed Claimant's gas

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<sup>8</sup> Dr. Fino stated:

If there is a gas exchange problem due to coal mine dust or other lung diseases, it is because the patient cannot transfer oxygen from the air sacs to the bloodstream across what is called the alveolar capillary membrane. That bridge, if you will, to get oxygen from the air sacs to the bloodstream can be affected by fibrosis or emphysema - which coal mine dust certainly can cause. However, a normal diffusing capacity rules out that type of abnormality. Hence there really would be no good reason why a coal miner would have such a drop in pO<sub>2</sub> with exertion due to coal mine dust in the presence of a normal diffusing capacity.

Employer's Exhibit 1 at 3-4.

exchange impairment to pulmonary emboli, as seen on two computed tomography scans, stating that blood clots can cause exercise induced hypoxemia. Employer's Exhibit 11.

The administrative law judge permissibly found Dr. Fino's opinion inadequately supported and explained because he did not provide any "medical literature or studies" to support the proposition that a normal diffusion capacity "rules out" a contribution from coal mine dust exposure,<sup>9</sup> or otherwise adequately explain why coal mine dust exposure did not significantly contribute, along with these other factors, to his pulmonary impairment. Decision and Order at 27; *see Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491-92 (6th Cir. 2014); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 27.

The remainder of Employer's assertions do not identify specific errors in the administrative law judge's consideration of Dr. Fino's opinion, but rather constitute a request for a reweighing of the evidence, which the Board is not empowered to do. *See Anderson*, 12 BLR at 1-113; Employer's Brief at 14-16. We therefore affirm the administrative law judge's finding that Dr. Fino's opinion fails to carry probative weight. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 25, 27-28. Accordingly, we further affirm the administrative law judge's determination that the medical opinion evidence establishes Claimant suffers from legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 27-28.

Finally, the administrative law judge found Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 32-33. Employer raises no specific arguments on disability causation, other than to assert Claimant does not have legal pneumoconiosis. Because we have affirmed the administrative law judge's finding of legal pneumoconiosis, we further affirm his

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<sup>9</sup> As noted above, in contrast, the administrative law judge found Dr. Green's opinion consistent with the medical science the Department of Labor credited in the preamble to the 2001 revised regulations. Decision and Order at 25. Moreover, as the administrative law judge observed, Dr. Forehand, whose report Dr. Fino reviewed and criticized, cited two articles to support his contrary opinion that disabled coal miners with impairments in gas exchange arising from coal dust-related lung disease can have a normal diffusing capacity. Decision and Order at 13, *citing* Director's Exhibit 15 at 3. While the administrative law judge declined to credit Dr. Forehand's diagnosis of legal pneumoconiosis as based on an inaccurate smoking history, he did not discredit this aspect of Dr. Forehand's opinion. Decision and Order at 24-25.

determination that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 32-33.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge