



BRB No. 21-0454 BLA

BARTER COLLINS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
STURGEON MINING COMPANY)	
)	
and)	
)	
KENTUCKY EMPLOYERS MUTUAL)	DATE ISSUED: 9/28/2022
INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
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 on Remand of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for Claimant.

Paul Jones, Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

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

ROLFE and GRESH, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Awarding Benefits on Remand (2016-BLA-05258) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on June 27, 2014, and is before the Benefits Review Board for the second time.¹

In his initial Decision and Order Awarding Benefits, the ALJ found Claimant had fewer than fifteen years of coal mine employment. Therefore, 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). However, considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis,³ a totally disabling respiratory or pulmonary impairment, and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). He therefore found Claimant established a change in an applicable condition of entitlement⁴ and awarded benefits. 20 C.F.R. §725.309(c).

¹ We incorporate the procedural history of the case as set forth in *Collins v. Sturgeon Mining Co.*, BRB No. 19-0116 BLA (Mar. 16, 2020) (unpub.).

² Section 411(c)(4) 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

³ Legal pneumoconiosis is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2). This definition “includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” *Id.*

⁴ Where 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)(1); *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. §725.309(c)(3). Because Claimant failed to establish any element of entitlement in his prior claim, he had to submit new evidence establishing an element of entitlement. *See* 20 C.F.R. §725.309(c); Director's Exhibit 1.

In consideration of Employer's appeal, the Board affirmed the ALJ's findings that Claimant established fewer than fifteen years of coal mine employment, total disability, and a change in an applicable condition of entitlement. *See Collins v. Sturgeon Mining Co.*, BRB No. 19-0116 BLA, slip op. at 3 n.7 (Mar. 16, 2020) (unpub.); 20 C.F.R. §§718.204(b), 725.309. The Board held, however, that the ALJ erred in weighing the medical opinion evidence on the issue of legal pneumoconiosis. *Collins*, BRB No. 91-0116 BLA, slip op. at 7. The Board therefore vacated the ALJ's finding that Claimant established legal pneumoconiosis and disability causation and remanded the case for further consideration of these issues. *Id.*; *see* 20 C.F.R. §§718.202(a)(4), 718.204(c).

On remand, the ALJ again found Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.202(a)(4), 718.204(c). Thus he awarded benefits.

On appeal, Employer contends the ALJ again erred. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.⁵ 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, 362 (1965).

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 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(a)(2), (b). The United States

⁵ 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 (1989) (en banc); Director's Exhibits 1 at 88, 4.

Court of Appeals for the Sixth Circuit has held that a claimant can satisfy this burden by showing coal dust exposure contributed “in part” to his respiratory or pulmonary impairment. *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.’”).

As discussed above, the Board addressed in the prior appeal the ALJ’s original finding that Claimant established legal pneumoconiosis. *Collins*, BRB No. 19-0116 BLA, slip op. at 4-6. The Board affirmed the ALJ’s finding that Dr. Ammisetty’s opinion is reasoned, documented, and thus sufficient to establish legal pneumoconiosis in the form of chronic bronchitis, bronchial asthma, chronic obstructive pulmonary disease (COPD), and hypoxemia due to a combination of coal mine dust exposure and cigarette smoking. *Id.* The Board also affirmed his discrediting of Dr. Jarboe’s contrary opinion that Claimant does not have legal pneumoconiosis. *Id.* at 4-5. The Board further held, however, that the ALJ did not adequately explain “his conclusions that Dr. Westerfield ‘conceded’ [C]laimant has legal pneumoconiosis and that his opinion supports Dr. Ammisetty’s diagnosis of legal pneumoconiosis.” *Id.* at 7, *quoting* Decision and Order at 18. Thus his original Decision and Order did not satisfy the explanatory requirements of the Administrative Procedure Act,⁶ 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Collins*, BRB No. 19-0116 BLA, slip op. at 7.

On remand, the ALJ reconsidered Dr. Westerfield’s opinion and again found he attributed Claimant’s COPD, in part, to coal dust exposure. Decision and Order on Remand at 2. He therefore found Claimant established legal pneumoconiosis based on the opinion of Dr. Ammisetty as supported by Dr. Westerfield. 20 C.F.R. §718.202(a)(4); Decision and Order on Remand at 2.

Employer argues the ALJ erred in failing to consider all relevant evidence regarding Dr. Westerfield’s opinion and mischaracterizing it as supportive of a finding of legal pneumoconiosis. Employer’s Brief at 5-6. We disagree.

In his report, Dr. Westerfield opined Claimant is totally disabled by a respiratory impairment. Director’s Exhibit 30 at 6. He stated the total respiratory disability is “due

⁶ The Administrative Procedure Act provides every adjudicatory decision must include “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

primarily to [COPD] resulting from cigarette smoking.” *Id.* But he further opined he could not “exclude a contribution of coal mine dust to [Claimant’s] respiratory injury.” *Id.*

During his deposition, Dr. Westerfield reiterated Claimant has COPD due primarily to cigarette smoking, but acknowledged that coal dust likely also played a role in causing it. Employer’s Exhibit 5 at 11-12. He stated that although he could not “rule out” a contribution, he believed that contribution alone “would not cause this man to be disabled.” *Id.* When Employer’s counsel specifically asked him if Claimant has legal pneumoconiosis, Dr. Westerfield replied that “because [Claimant] does have some respiratory impairment and he does have coal mine dust exposure[,] one cannot rule out legal pneumoconiosis. So you can make a diagnosis of legal pneumoconiosis.” *Id.*

Contrary to the ALJ’s finding, Dr. Westerfield’s statement that he “cannot rule out” a contribution from coal dust to Claimant’s respiratory impairment does not amount to an overt concession that Claimant has legal pneumoconiosis under the Sixth Circuit’s definition of the disease. Employer’s Exhibit 5 at 11-12; Director’s Exhibit 30 at 6; *see Young*, 947 F.3d at 407; *Groves*, 761 F.3d at 598-99, 600. Nonetheless, any error the ALJ made in finding Dr. Westerfield explicitly conceded Claimant suffered from legal pneumoconiosis based on his “rule out” language is harmless under the facts of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Since all the physicians agree Claimant’s COPD is totally disabling, the sole remaining question in this claim is whether his COPD constitutes legal pneumoconiosis -- not whether coal dust alone could have caused his impairment. As we have described, Dr. Ammisetty concluded coal dust significantly contributed to Claimant’s COPD and that it therefore constitutes legal pneumoconiosis; Dr. Jarboe’s maintained coal dust exposure played “no part” whatsoever in Claimant’s impairment. In weighing the competing opinions, the ALJ reasonably determined Dr. Westerfield supported Dr. Ammisetty and undermined Dr. Jarboe by concluding Claimant’s COPD is due “in part to coal mine dust exposure” rather than resulting entirely from smoking. Decision and Order on Remand at 2. While in the ALJ’s view Dr. Ammisetty used “inartful” language, the ALJ reasonably determined the totality of his testimony confirms he attributed a discernible “degree” of Claimant’s impairment to coal dust exposure. *Id.* Given that reasonable interpretation of Dr. Westerfield’s testimony was well-within the ALJ’s discretion as the fact-finder, any error in mischaracterizing Dr. Westerfield’s opinion as an explicit concession under an incorrect definition of legal pneumoconiosis is harmless since it is unnecessary to meet Claimant’s burden under the ALJ’s permissible rationale. *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”).

We therefore affirm the ALJ's finding that Claimant established the existence of legal pneumoconiosis based on Dr. Ammisetty's opinion. 20 C.F.R. §718.202(a)(4); Decision and Order on Remand at 2.

Disability Causation

A miner is totally disabled due to pneumoconiosis if it 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" 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 caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

The ALJ correctly explained that because Claimant established the existence of legal pneumoconiosis, the proper inquiry on the issue of disability causation involves the contribution that legal pneumoconiosis makes to his total respiratory disability. 20 C.F.R. §718.204(c)(1); Decision and Order on Remand at 3-4. As "Claimant established that he has legal pneumoconiosis in the form of COPD," the ALJ addressed whether the evidence establishes COPD is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. *Id.*

The ALJ determined Drs. Ammisetty and Jarboe agreed Claimant has a totally disabling respiratory impairment due to his COPD. Decision and Order on Remand at 3-4. Substantial evidence supports this finding. As discussed above, Dr. Ammisetty diagnosed a disabling pulmonary impairment evidenced by qualifying⁷ pulmonary function testing, and he attributed this impairment to "[c]hronic bronchitis, bronchial asthma, COPD, legal pneumoconiosis, hypoxemia substantially exacerbated by coal dust exposure as well as smoking." Director's Exhibit 14 at 31. Dr. Jarboe opined Claimant's pulmonary function testing is consistent with disabling "[s]evere obstructive airways disease" evidenced by reduced FEV1 and FEV1/FVC values. Director's Exhibit 33 at 6, 11. He concluded, however, that the "severe airflow obstruction" was "caused by a combination of heavy cigarette smoking and bronchial asthma." *Id.* at 6. Because the ALJ found Claimant's COPD constitutes legal pneumoconiosis and all the doctors agreed Claimant is totally disabled due to COPD, the ALJ found their opinions establish Claimant's total disability is due to legal pneumoconiosis. Decision and Order on Remand at 3-4.

⁷ A "qualifying" pulmonary function study yields values equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i).

Employer argues the ALJ erroneously “extrapolated” his finding that Claimant has legal pneumoconiosis in the form of COPD to find Claimant established total disability due to pneumoconiosis. Employer’s Brief at 6. It asserts there is no medical opinion in the record that establishes pneumoconiosis is a substantially contributing cause of his total disability. *Id.* at 6-8. We disagree.

Rejecting a similar argument, the Sixth Circuit explained that where all the medical experts “agreed that [the miner’s] pulmonary problems were a significant cause of his total disability, the only question remaining was whether coal mine employment caused the pulmonary problems.” *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). The legal pneumoconiosis inquiry “completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner’s] pulmonary impairment that led to his disability.” *Id.*; see also *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 668-69 (6th Cir. 2015); *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where a miner’s COPD constituted legal pneumoconiosis and all the medical experts agreed that COPD contributed to the miner’s death); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 256 (2019).

Employer does not allege Claimant is totally disabled by a respiratory condition other than COPD. Thus, the ALJ’s determination that Claimant’s COPD constitutes legal pneumoconiosis necessarily encompassed a finding that he is totally disabled due to legal pneumoconiosis. *Ramage*, 737 F.3d at 1062; *Kennard*, 790 F.3d at 668-69; *Collins*, 751 F.3d at 186-87; *Hawkinberry*, 25 BLR at 256; Decision and Order on Remand at 4. We therefore affirm the ALJ’s finding that Claimant established total disability due to legal pneumoconiosis.⁸ 20 C.F.R. §718.204(c). Consequently, we affirm the ALJ’s finding that Claimant established entitlement under 20 C.F.R. Part 718 and, therefore, the award of benefits.

⁸ Because substantial evidence supports the ALJ’s finding that Claimant established total disability due to legal pneumoconiosis based on Drs. Ammisetty’s and Jarboe’s opinions, any error the ALJ made in considering Dr. Westerfield’s disability causation opinion is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the ALJ's Decision and Order Awarding Benefits on Remand is affirmed.

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