



BRB No. 18-0600 BLA

JAMES W. CASTO (deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PRINCESS SUSAN COAL COMPANY)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	DATE ISSUED: 10/24/2019
PNEUMOCONIOSIS FUND)	
)	
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 of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Green and Lucinda L. Fluharty (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05784) of Administrative Law Judge Natalie A. Appetta, on a claim filed on April 23, 2015 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Because the administrative law judge credited claimant with thirteen years of coal mine employment,¹ she found he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012). Turning to whether he established entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found the evidence established both clinical pneumoconiosis,³ and legal pneumoconiosis⁴ in the form of chronic obstructive pulmonary disease (COPD) and hypoxemia due to coal mine dust exposure and cigarette smoking. 20 C.F.R. §§718.202(a), 718.201(b). Finally, she found claimant was totally disabled due to pneumoconiosis, 20 C.F.R. §718.204(b), (c), and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding the evidence established clinical and legal pneumoconiosis. Employer also argues the

¹ Claimant's coal mine employment was in West Virginia. Hearing Transcript at 31. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he 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) (2012); *see* 20 C.F.R. §718.305.

³ "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 "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).

administrative law judge erred in finding claimant's total disability was due to pneumoconiosis. Claimant⁵ responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁶

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, 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. See *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).

Employer argues the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis. In order to establish legal pneumoconiosis, claimant must prove that he 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 administrative law judge considered the opinions of Drs. Berro, Green, Zaldivar, and Farney. Dr. Berro diagnosed COPD and emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 13. Dr. Green diagnosed COPD and hypoxemia due to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 1. Drs. Zaldivar and Farney, however, opined claimant did not have legal pneumoconiosis. Dr. Zaldivar stated claimant's pulmonary impairment was due to asthma, cigarette smoking, and hard metal disease, Director's Exhibit 25; Employer's Exhibit 10, while Dr. Farney diagnosed COPD due to cigarette smoking. Employer's Exhibits 6, 9.

⁵ Claimant died on April 15, 2018. Decision and Order at 2 n.4. His surviving spouse is pursuing the claim. *Id.*

⁶ We affirm, as unchallenged on appeal, the administrative law judge's finding of a totally disabling respiratory or pulmonary impairment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge found it unclear whether Dr. Berro relied on an accurate history of coal mine dust exposure. Decision and Order at 21. She also found the physician significantly underestimated claimant's smoking history. *Id.* She therefore found Dr. Berro's diagnosis of legal pneumoconiosis poorly documented and entitled to little weight. *Id.* The administrative law judge also accorded less weight to Dr. Zaldivar's opinion, finding his diagnoses of hard metal disease and asthma not sufficiently documented. *Id.* Finally, the administrative law judge credited Dr. Green's diagnosis of legal pneumoconiosis over Dr. Farney's contrary opinion because she found it better reasoned. *Id.* at 21-22. The administrative law judge therefore found the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Employer contends the administrative law judge erred in finding Dr. Green's opinion sufficient to support a finding of legal pneumoconiosis. Employer's Brief at 14-15. Employer argues that, because Dr. Green did not explicitly state that claimant's COPD and hypoxemia were "significantly related to," or "substantially aggravated by," dust exposure in coal mine employment, his opinion is "deficient." *Id.* at 14, *citing* 20 C.F.R. §718.201(a)(2), (b). We disagree. Although claimant has the burden to establish that his lung disease or impairment arose out of coal mine employment, he can satisfy that burden by showing his lung disease or impairment was caused "in part" by coal mine employment. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 311-12 (4th Cir. 2012) (doctor's opinion that lung disease arose from "a combination of" coal mine dust exposure and smoking sufficient to establish legal pneumoconiosis); *see also Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (claimant can satisfy his burden to prove that his impairment was "significantly related to, or aggravated by, exposure to coal dust" by showing that his disease was caused "in part" by coal mine employment).

The administrative law judge noted Dr. Green attributed claimant's COPD and hypoxemia to both coal mine dust exposure and smoking.⁷ Decision and Order at 22. She accurately characterized Dr. Green as diagnosing legal pneumoconiosis and adequately explained why she found his opinion credible.⁸ Decision and Order at 22. Thus, we affirm

⁷ Dr. Green opined that while cigarette smoking was "a predominant factor" in causing claimant's chronic airflow obstruction and hypoxemia, his "[thirteen] year occupational history of exposure to respirable coal and rock dust is an additional factor that cannot be eliminated as contributing at least in part to [these conditions]." Claimant's Exhibit 1 at 4.

⁸ The administrative law judge permissibly relied on Dr. Green's opinion because she found it based on the totality of information from his examination, including relevant work and social histories, claimant's symptoms, and the results of objective tests. *See*

the administrative law judge's determination that Dr. Green's opinion is sufficiently credible to establish legal pneumoconiosis and satisfy claimant's burden of proof. See *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006).

Employer also contends the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Farney. Employer's Brief at 15-19. We disagree. The administrative law judge noted Dr. Zaldivar attributed claimant's pulmonary impairment in part to hard metal disease. Dr. Zaldivar opined that claimant's hard metal disease was attributable to his work as an axe grinder from 1966 to 1980. Director's Exhibit 25. The administrative law judge, however, noted the record is devoid of any evidence regarding the intensity of claimant's exposure to hard metal dust during his time as an axe grinder, "or even what dusts he was exposed to [during] his axe grinding work." Decision and Order at 20-21. The administrative law judge noted Dr. Zaldivar's understanding of claimant's metal dust exposure was based on his review of medical literature and "tool sharpening" material, not on claimant's actual exposure. *Id.* The administrative law judge permissibly questioned Dr. Zaldivar's opinion because she found his diagnosis of hard metal disease "poorly documented." See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

She also permissibly accorded less weight to Dr. Farney's opinion because, although the doctor explained why claimant's COPD and hypoxemia were due to cigarette smoking, he failed to adequately explain why these conditions could not also have been caused in part by coal mine dust exposure. See 20 C.F.R. §718.201(b); *Looney*, 678 F.3d at 313-314; Decision and Order at 22. Because substantial evidence supports the administrative law judge's bases for discrediting the opinions of Drs. Zaldivar and Farney, we affirm them.⁹ See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000). We

Island Creek Coal Co. v. Compton, 211 F.3d 203, 212 (4th Cir. 2000); Decision and Order at 22; Claimant's Exhibit 1.

⁹ Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Zaldivar and Farney, any error in her other reasons for according them less weight is harmless. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight the administrative law judge accorded to those opinions.

therefore affirm the administrative law judge's finding that claimant has legal pneumoconiosis.¹⁰ 20 C.F.R. §§718.202(a), 718.201(b).

Employer next argues the administrative law judge erred in finding claimant's total disability was due to legal pneumoconiosis. Employer's Brief at 23-28. To establish disability causation, claimant must prove that pneumoconiosis was 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 of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[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).

As we held above, the administrative law judge permissibly relied on Dr. Green's opinion to find legal pneumoconiosis, in the form of disabling COPD and hypoxemia due in part to coal mine dust exposure. Thus, she rationally found Dr. Green's opinion also supported a finding that legal pneumoconiosis was a "substantially contributory cause" of his total disability. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order at 26. Moreover, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Farney because they did not diagnose legal pneumoconiosis. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 26. Therefore, we affirm the administrative law judge's finding that claimant's total disability was due to legal pneumoconiosis. 20 C.F.R. §718.204(c).

¹⁰ In light of our affirmance of the administrative law judge's finding that the medical opinions established legal pneumoconiosis, we need not address the administrative law judge's finding that the evidence also established the existence of clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge