U.S. Department of Labor

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

BRB Nos. 21-0541 BLA
and 21-0541 BLA-A

ERWIN D. MCKEE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 04/12/2023
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits of Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal, and Claimant cross-appeals, Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Granting Benefits (2018-BLA-05896) rendered on a subsequent claim filed on August 29, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ initially found Heritage Coal Company, LLC (Heritage) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He found Claimant did not establish complicated pneumoconiosis and therefore is unable to 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. In addition, he found Claimant has less than fifteen years of qualifying coal mine employment and thus 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) (2018).[2] Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established total disability due to pneumoconiosis and a change in an applicable condition of entitlement.[3] 20 C.F.R.

[1] Claimant filed an initial claim on August 31, 2009, which the district director denied on August 11, 2010, because the evidence did not establish Claimant had pneumoconiosis or that his respiratory disability was due to pneumoconiosis. Director's Exhibit 1. This denial became final in September 2010, thirty days after it was issued. *Id*. at 1, 7.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he finds that

§§718.202, 718.203, 718.204(b)(2), (c), 725.309(c). Consequently, the ALJ awarded benefits commencing in August 2017, when Claimant filed his subsequent claim.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. On the merits, it argues the ALJ erred in finding Claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, legal pneumoconiosis, and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief, urging the Benefits Review Board to reject Employer's liability arguments but declining to address the merits of entitlement.

Claimant also filed a cross-appeal, challenging the ALJ's determination of the date for the commencement of benefits. Employer responded to Claimant's cross-appeal, urging affirmance of the ALJ's determination. Claimant replied, reiterating his contentions on appeal. The Director declined to file a response to Claimant's cross-appeal.

"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 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 established total disability in the prior denied claim, *see* Director's Exhibit 1 at 10, the ALJ misstated that Claimant's establishment of a totally disabling respiratory or pulmonary impairment in this subsequent claim constitutes a change in an applicable condition of entitlement. Decision and Order at 35. Some of the confusion may stem from the claims examiner's order in the prior denied claim which initially states, perhaps because of a scrivener's error, that the evidence "does not . . . establish disability," but then correctly concludes that the pulmonary function studies performed both as part of Dr. Chavda's DOL examination and by Employer's expert, Dr. Repsher, "meet the regulatory standards to establish total disability." Director's Exhibit 1 at 6, 10; *see* Employer's Response to Claimant's Cross-Appeal at 2 (unpaginated) ("In 2010, the Claims Examiner agreed that the pulmonary function studies established a totally disabling impairment. However, considering the opinions of doctors Chavda and Repsher, [she] found that the evidence failed to establish that this impairment was 'due to pneumoconiosis.'"). Any error by the ALJ is harmless, however, given that the ALJ also found Claimant established pneumoconiosis and total disability due to pneumoconiosis, two conditions upon which the prior denial was based. Further, Employer does not contest the ALJ's finding that Claimant has a totally disabling respiratory or pulmonary impairment; we therefore affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator and was self-insured by Peabody Energy on the last day Heritage employed Claimant; thus we affirm these findings.[5] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see* 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 33-35. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Brief at 2. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. *Id*. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id*. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. *Id*. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6 n.14; Hearing Transcript at 30.

[5] Employer also states it intends to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 53-54 (unpaginated). Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act; Employer also contends the Department of Labor acted arbitrarily and capriciously by not following its own self-insurance regulations. *Id*. Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

by Heritage when Peabody Energy owned and provided self-insurance to that company. *Id*.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated as the self-insured carrier in this claim and thus the Trust Fund is responsible for the payment of benefits following Patriot's bankruptcy: (1) the claims examiners and the district director are inferior officers not properly appointed under the Appointments Clause[6]; (2) the Department of Labor (DOL) released Peabody Energy from liability; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the Director is equitably estopped from imposing liability on Peabody Energy; (5) the regulatory scheme whereby the district director determines the liability of a responsible carrier and its operator, while also administering the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (6) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to monitor Patriot's financial health; (7) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act; (8) by transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; and (9) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced. Employer's Brief at 16-62 (unpaginated). Employer further maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.[7]

[6] Employer first challenged the authority of the claims examiners and the district director after the claim had already been transferred to the Office of Administrative Law Judges. Employer's Post-Hearing Brief dated June 15, 2020 at 22-24.

[7] Contrary to Employer's argument, the ALJ did not rely on 20 C.F.R. §§725.493(b)(2) and 725.495(a)(2) to determine Peabody Energy is liable. Rather, he determined Peabody Energy is liable for this claim as Heritage's self-insurer, not as the responsible operator. *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip

We also reject Employer's assertion that the ALJ erred in excluding the deposition transcripts of David Benedict and Steven Breeskin, two former DOL Division of Coal Mine Workers' Compensation officials, and associated documents submitted as Employer's Exhibits 1, 2, 7, and 8.[8] Employer's Brief at 16-22 (unpaginated). In *Bailey*, the same deposition transcripts and documentary evidence were admitted and the Board held they do not support Employer's argument that the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit Patriot financed under Peabody Energy's self-insurance program.[9] *Bailey*, BLR , BRB No. 20-0094 BLA at 15 n.17. Given that the Board has previously held the same deposition testimony and documentary evidence does not support Employer's argument, any error in excluding them in this case is harmless. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we affirm the ALJ's determination that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.[10]

---

op. at 14 n.19 (Oct. 18, 2022); Decision and Order at 33-35; Employer's Brief at 44-46 (unpaginated).

[8] Employer identified Employer's Exhibits 1, 2, 7, and 8 "as the deposition transcripts of David Benedict and Steven Breeskin, the *ex parte* portions of those transcripts, and their associated exhibits." January 10, 2020 Order (citing Joint Pre-Hearing Exhibit at 7). The ALJ excluded this evidence because he found Employer did not timely identify the liability witnesses to the district director or establish extraordinary circumstances for the late admission of their deposition transcripts and associated documents. *Id.* at 5-7, 9; *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). This was proper. *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 11-13 (Oct. 25, 2022) (en banc) *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022).

[9] This determination was necessary to the conclusion that Peabody was liable for benefits. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n.17.

[10] Employer states that it wants to "preserve" its argument that the ALJ violated its due process rights because he "cut off" discovery "prematurely." Employer's Brief at 48 (unpaginated). But it neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; 20 C.F.R. §802.211(b). In addition, Employer's argument challenging the pilot

Employer's Appeal - Entitlement Under 20 C.F.R. Part 718

Without 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 he has 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 four medical opinions. He primarily credited Dr. Krefft's opinion, and to a lesser degree Dr. Chavda's opinion, to find Claimant has legal pneumoconiosis, over the contrary opinions of Drs. Repsher,[11] Tuteur, and Selby. Consequently, the ALJ concluded Claimant established he has legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer argues Dr. Krefft's June 25, 2019 opinion is not well-reasoned because she merely checked boxes on a standard form Claimant's counsel presented to her that had leading questions. Employer's Brief at 15 (unpaginated). We disagree. Although Dr. Krefft did check boxes on the form she was provided, she also gave detailed responses that the ALJ relied on to find her opinion credible. *See* Claimant's Exhibit 10.

As the ALJ accurately noted, Dr. Krefft explained Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD), chronic

---

program is rejected, as program-derived evidence was not used in this case. Employer's Brief at 46-47 (unpaginated); Director's Brief at 14 n.7, 29-31.

[11] Dr. Repsher diagnosed chronic obstructive pulmonary disease solely due to smoking. Director's Exhibit 1 at 58. The ALJ gave Dr. Repsher's opinion little weight because he "examined Claimant more than ten years ago," and his reasoning was inconsistent with the regulations. Decision and Order at 15, 44-45. Employer does not challenge these findings, and thus we affirm them. *See Skrack*, 6 BLR at 1-711.

bronchitis and emphysema due to both smoking and coal mine dust exposure. Claimant's Exhibit 10 at 11. She based her opinion on Claimant's exclusively underground coal mine employment in high exposure jobs, daily symptoms of shortness of breath, treatment with bronchodilators, pulmonary function testing showing severe airflow limitation, and blood gas testing reflecting resting hypoxemia. *Id*. at 2-3. She explained the "pattern of emphysema [seen on Claimant's computed tomography (CT) scans] cannot be used to identify a single etiologic exposure." *Id*. at 3. And while Claimant had a prior history of treatment for histoplasmosis, Dr. Krefft indicated his current radiographic findings were not typical of histoplasmosis. *Id*. Because the ALJ acted within his discretion in finding Dr. Krefft's opinion reasoned and documented, we affirm his crediting of her opinion.[12] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *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).[13]

We also affirm the ALJ's finding that the contrary medical opinions do not outweigh Dr. Krefft's opinion. Dr. Tuteur attributed Claimant's COPD in the form of emphysema and chronic bronchitis to his seventy-two pack-years of smoking, his childhood exposure to fossil fuel fumes, and his suboptimally-controlled gastroesophageal reflux disease, but not to coal mine dust exposure. Employer's Exhibits 5 at 3; 15 at 16-18. Although Dr. Tuteur conceded the clinical picture of COPD due to smoking and coal mine dust exposure

[12] Employer incorrectly asserts Dr. Krefft's opinion on legal pneumoconiosis is based on an erroneous belief that Claimant has clinical pneumoconiosis—she specifically stated her diagnosis of legal pneumoconiosis would not change even if the x-ray evidence was negative. Claimant's Exhibit 10 at 10; Employer's Brief at 14 (unpaginated). Employer also contends that because Dr. Krefft did not provide the dates for all the evidence she considered, her opinion is not documented. Employer's Brief at 15 (unpaginated). However, whether Dr. Krefft's opinion provided sufficient detail for the ALJ to find it persuasive is a matter within his discretion. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Additionally, there is no merit to Employer's assertion that Dr. Krefft improperly relied on evidence not of record because she considered evidence from Claimant's prior claim. Employer's Brief at 15 (unpaginated); *see* 20 C.F.R. §725.309(c)(2) ("Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.").

[13] Having affirmed the ALJ's reliance on Dr. Krefft's opinion that Claimant has legal pneumoconiosis, we need not address Employer's arguments regarding Dr. Chavda's opinion. *See* Employer's Brief at 15 (unpaginated); Claimant's Exhibit 8.

is "generally similar," he eliminated coal mine dust as a cause for Claimant's COPD based on the relative risks of developing COPD due to smoking versus coal mine dust exposure. Employer's Exhibits 5 at 3; 15 at 18-19, 26. He acknowledged the x-ray and CT scan evidence reflected treated histoplasmosis but believed it was not a substantial contributing factor in Claimant's impairment. *Id*. at 21-23.

Dr. Selby diagnosed an obstructive pulmonary impairment caused by uncontrolled asthma and chronic bronchitis unrelated to coal mine dust exposure. He also diagnosed emphysema shown on the CT scans and attributed it to smoking and childhood exposure to heating or cooking stove smoke, but not coal mine employment. Employer's Exhibit 16 at 11-13, 29-30, 34. Similar to Dr. Tuteur, he relied on statistical probabilities in identifying smoking as the sole cause of Claimant's impairment. *Id*. at 20. Dr. Selby also related Claimant's emphysema to smoking based on the reduction seen on Claimant's diffusing capacity testing.[14] *Id*. at 20-22.

Employer argues the ALJ's rejection of its medical experts' opinions on legal pneumoconiosis is tied to his erroneous conclusion that Claimant has clinical pneumoconiosis. But the ALJ specifically rejected the opinions of Drs. Tuteur and Selby because he found they relied on generalities and statistics and did not adequately explain why Claimant's 12.5 years of coal mine dust exposure working at the face of the mine did not contribute, along with smoking, to his respiratory impairment. Decision and Order at 45-46; Employer's Exhibits 5, 15, 16, 19, 22. Because Employer does not challenge the ALJ's specific rationale, we affirm his findings. *See Skrack*, 6 BLR at 1-711.

Employer's arguments on appeal are 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 Claimant established legal pneumoconiosis based on the medical opinion evidence.[15] 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007) (it is the province of the

[14] Dr. Selby related Claimant's emphysema to smoking based on the "classic pattern" seen on CT scan but he did not discuss Claimant's chronic bronchitis or asthma in relation to the radiographic evidence. Employer's Exhibit 19 at 30. Thus, we reject Employer's contention that the ALJ's finding of legal pneumoconiosis is dependent on his allegedly erroneous conclusion that Claimant has clinical pneumoconiosis.

[15] Because we affirm the ALJ's finding that Claimant established legal pneumoconiosis, we decline to address Employer's arguments regarding clinical pneumoconiosis. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Decision and Order at 5 n.7, 40-43; Employer's Brief at 10-14 (unpaginated).

ALJ to evaluate the medical evidence, draw inferences, and assess the probative value of the evidence); *Napier*, 301 F.3d at 713-14; Decision and Order at 47.

Disability Causation

To establish disability causation, Claimant must prove his legal pneumoconiosis 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 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); *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599 (6th Cir. 2014).

Employer argues the ALJ improperly shifted the burden of proof to Employer to disprove disability causation and failed to properly consider whether Claimant established his legal pneumoconiosis had more than a de minimis impact in causing his total disability. Employer's Brief at 15-16 (unpaginated). We disagree.

In cases such as this one, where all the medical experts agree the miner suffers from disabling COPD, the ALJ's finding that the disabling COPD constitutes legal pneumoconiosis subsumes and resolves the disability causation question. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019). Because the ALJ permissibly credited Dr. Krefft's opinion that Claimant's disabling COPD is legal pneumoconiosis, it necessarily follows that Dr. Krefft's opinion is sufficient to satisfy Claimant's burden of proving he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Kennard*, 790 F.3d at 668-69; *Ramage*, 737 F.3d at 1062; *Hawkinberry*, 25 BLR at 1-255-57; Decision and Order at 47. Moreover, the ALJ permissibly discredited Employer's doctors because they did not diagnose legal pneumoconiosis, contrary to his finding that Claimant suffers from the disease, and because their "opinions on disability causation are inseparably linked to their unconvincing conclusions on the issue of legal pneumoconiosis." Decision and Order at 47 (citing *Hobet Mining v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015)). Consequently, as Claimant has established each element of entitlement under 20 C.F.R. Part 718, we affirm the ALJ's award of benefits.

Claimant's Cross-Appeal-Commencement Date for Benefits

Benefits commence in the month the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 1119 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04

(3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable from all the relevant evidence, benefits commence in the month the claim was filed, unless credited evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green*, 790 F.2d at 1119 n.4; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, benefits may not be paid for any period before the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

In considering the proper commencement date for benefits in Claimant's subsequent claim, the ALJ noted Claimant alleged he was entitled to benefits at some point prior to the filing date of his claim and presented "three alternative entitlement dates, one in 2009 based on a qualifying pulmonary function study conducted for Dr. Chavda [on December 30, 2009], and two in 2010, based on Dr. Chavda's 2010 assessment of a moderately severe airway disease and Dr. Repsher's ventilatory study results." Decision and Order at 47. The ALJ also noted that "[a]t the latest, he asserts that he was totally disabled by June, 2010." *Id*. The ALJ summarily concluded "the 2009 and 2010 evidence cited by Claimant does not establish total respiratory disability *due to pneumoconiosis*" and "the onset date of total disability due to pneumoconiosis is not ascertainable on this record." *Id*. at 48 (emphasis in original). He thus awarded benefits commencing in August 2017, the month Claimant filed his claim. *Id*. at 48.

On appeal, Claimant asserts benefits should commence "the month after the prior benefits [denial] became final in September 2010," relying on the December 30, 2009 qualifying pulmonary function test and Dr. Chavda's March 22, 2019 deposition testimony indicating Claimant has had totally disabling COPD due in part to coal mine dust exposure since 2009. Claimant's Cross-Appeal at 11; Director's Exhibit 1 at 193; Claimant's Exhibit 8 at 10, 13, 18. He requests the Board modify the ALJ's determination of the onset date of his total disability due to pneumoconiosis or vacate the ALJ's onset date determination and remand the issue to him for reconsideration. Claimant's Cross-Appeal at 21.

As Claimant alleges, the ALJ did not address Dr. Chavda's March 2019 deposition testimony in considering whether Claimant was totally disabled due to pneumoconiosis prior to the filing date of his subsequent claim. Claimant's Cross-Appeal at 10-14; *see* Claimant's Supplemental Post-Hearing Brief at 6-7 (arguing Dr. Chavda's deposition testimony supports an onset finding of December 2009).[16] Thus, the ALJ did not

[16] Claimant also noted in his brief to the ALJ that, as the claims examiner found in the prior denied claim, the December 30, 2009 pulmonary function study Dr. Chavda conducted is qualifying for total disability, as is the June 8, 2010 pulmonary function study

adequately explain his finding of the commencement date for benefits in light of "all relevant evidence." 30 U.S.C. §923(b). Because the question of whether the evidence establishes Claimant became totally disabled due to pneumoconiosis in 2009 requires factual and credibility determinations within the purview of the ALJ, we decline Claimant's request to modify the ALJ's findings. 20 C.F.R. §725.503(b); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (ALJ weighs the evidence, draws inferences, and determines credibility). Thus, we vacate the ALJ's determination that benefits commence in August 2017, and remand this case to the ALJ to consider all relevant evidence regarding the onset date of Claimant's total disability due to pneumoconiosis. 30 U.S.C. §923(b).

On remand, the ALJ must consider Dr. Chavda's deposition testimony[17] as it relates to the onset date and determine if it establishes when Claimant became totally disabled due to pneumoconiosis. Because benefits cannot be awarded prior to the date upon which the order denying the prior claim became final, the ALJ on remand cannot award benefits prior to October 2010, the month after the denial of the prior claim became final. 20 C.F.R. §725.309(c)(6).

Dr. Repsher conducted. *See* Claimant's Supplemental Post-Hearing Brief at 6-7; Director's Exhibit 1 at 64 (Dr. Repsher's testing), 193 (Dr. Chavda's testing). Claimant argued this evidence, in conjunction with Dr. Chavda's March 2019 testimony, establishes an onset of Claimant's total disability due to pneumoconiosis prior to the filing of his current claim.

[17] Dr. Chavda testified he diagnosed Claimant with a disabling obstructive impairment based on Claimant's 2009 pulmonary function testing and also attributed that impairment, in part, to coal mine dust exposure. Claimant's Exhibit 8 at 6-10, 22-23. He also testified that Claimant's disabling obstruction (legal pneumoconiosis) had a material adverse effect on his respiratory or pulmonary condition, and materially worsened his totally disabling respiratory impairment caused by a disease unrelated to coal mine dust exposure. *Id*. at 23-24.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Granting Benefits and remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge