**U.S. Department of Labor**

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

BRB No. 20-0327 BLA

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| ROCKY A. JENKINS | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| C & D SERVICES, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN RESOURCES COMPANY | ) | DATE ISSUED: 08/31/2021 |
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| Employer/Carrier-Petitioners | ) | |
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| 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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

Matthew J. Zanetti and Thomas L. Ferreri (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Awarding Benefits (2018-BLA-05787) rendered on a

subsequent claim[1] filed on June 16, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Based on the parties' stipulations, the ALJ credited Claimant with eleven years and five months of coal mine employment and thus found 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) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, she found Claimant established the existence of legal pneumoconiosis,[3] total disability due to pneumoconiosis, and a change in an applicable condition of entitlement.[4] 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), 725.309. Thus, she awarded benefits.

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[1] The district director denied Claimant's initial claim, filed on February 7, 2005, for failure to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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), as implemented by 20 C.F.R. §718.305.

[3] "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). "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] 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 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 conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element of entitlement in order to obtain review of the merits of his current claim. *Id.*

On appeal, Employer asserts the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation.[5] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

The Benefits Review 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.[6] 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 (1965).

## Part 718 Entitlement

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. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element 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 that 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 has held that a miner can establish legal pneumoconiosis "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (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

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[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established eleven years and five months of coal mine employment, a totally disabling respiratory or pulmonary impairment, and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 725.309; Decision and Order at 3, 25.

[6] 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); Director's Exhibit 4.

mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

Dr. Forehand diagnosed legal pneumoconiosis in the form of obstructive lung disease and interstitial lung disease caused by a combination of cigarette smoking and coal mine dust exposure. Director's Exhibit 34 at 6; Employer's Exhibit 2 at 10-12. Dr. Dahhan opined Claimant has chronic bronchitis and emphysema due to cigarette smoking but unrelated to coal mine dust exposure. Director's Exhibit 35 at 5-6. Dr. Broudy diagnosed chronic obstructive pulmonary disease (COPD) due to smoking, obesity, and cardiac disease but opined Claimant's impairment is unrelated to coal mine dust exposure. Employer's Exhibit 3 at 4-6.

The ALJ found Dr. Forehand's opinion well-reasoned and well-documented because it is consistent with Claimant's treatment records, which document a "long-standing" diagnosis and treatment for COPD and because his conclusions regarding the additive effects of smoking and coal mine dust exposure in causing COPD are consistent with the studies cited in the preamble to the 2001 revised regulations. Decision and Order at 21-22, *citing* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000). In contrast, she found the opinions of Drs. Dahhan and Broudy not well-reasoned or well-documented because they did not address the additive nature of smoking and coal mine dust exposure and did not explain why coal mine dust could not have contributed, along with Claimant's smoking history, to his obstructive impairment. Decision and Order at 22-23.

Employer does not specifically challenge the ALJ's credibility findings with respect to Drs. Dahhan's and Broudy's opinions. Thus, we affirm her rejection of their opinions. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (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); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.201(b); Decision and Order at 22-23.

Employer argues the ALJ erred in crediting Dr. Forehand's opinion because, in stating he could not differentiate between the effects of coal dust exposure and cigarette smoking, the physician impermissibly assumed Employer had the burden to disprove legal pneumoconiosis. Employer's Brief at 11-13. We disagree.

As the ALJ observed, Dr. Forehand stated it was not possible to distinguish the relative contribution of smoking and coal dust exposure, but also specifically opined, contrary to Employer's assertion, that Claimant's coal mine dust exposure contributed to his impairment. Decision and Order at 10-11; Employer's Exhibit 2 at 11-12. The ALJ permissibly found his opinion consistent with the Department of Labor's recognition that the risks of smoking and coal dust exposure are additive. *Crockett Collieries, Inc. v.*

*Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Adams*, 694 F.3d at 801-02; 65 Fed. Reg. at 79,940; Decision and Order at 21-22. Moreover, a physician need not apportion a specific percentage of a miner's lung disease to coal mine dust as opposed to cigarette smoke or other factors in order 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, as supported by substantial evidence, the ALJ's determination to assign "significant weight" to Dr. Forehand's opinion. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 21-22.

Because Employer raises no other specific arguments regarding the ALJ's credibility findings,[7] we affirm her weighing of the medical opinions concerning legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 19. Consequently we affirm her determination that Claimant established the disease.

**Disability Causation**

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

[7] Employer asserts the ALJ failed to make a specific finding regarding the length of Claimant's smoking history and generally asserts that, had she made a specific finding, it may have colored her evaluation of the opinion evidence. Employer's Brief at 9-11. Contrary to Employer's assertion, the ALJ specifically found credible Claimant's testimony concerning his smoking history and concluded the record establishes a forty pack-year history. Decision and Order at 5. She further specifically recounted the smoking history reported by each physician, noting Dr. Forehand reported forty-two years of cigarette smoke exposure, Dr. Dahhan reported approximately forty years, and Dr. Broudy reported forty years of exposure at up to two packs per day. Decision and Order at 9-14; Director's Exhibits 34-35; Employer's Exhibits 2-3.

§718.204(c)(1)(i), (ii). The ALJ relied on Dr. Forehand's opinion to find Claimant is totally disabled due to legal pneumoconiosis. Decision and Order at 27.

We reject Employer's contention that the ALJ assessed the medical opinions based on a less stringent "in part" legal standard rather than the applicable "substantially contributing cause" standard. Employer's Brief at 8-9. The ALJ articulated the proper standard under the regulations for establishing disability causation, i.e., Claimant must establish that pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 599; Decision and Order at 26. She further recognized pneumoconiosis is a "substantially contributing cause" if it has a material adverse effect on a miner's respiratory or pulmonary condition, or materially 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); Decision and Order at 26.

Dr. Forehand opined coal mine dust exposure was a substantial contributing cause of Claimant's disabling obstructive lung disease and interstitial lung disease. Director's Exhibit 34 at 6; Employer's Exhibit 2 at 10-11. Because we have affirmed the ALJ's reliance on Dr. Forehand's opinion to find these diseases are legal pneumoconiosis, we see no error in her reliance on Dr. Forehand's opinion to also find disability causation established. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 27.

Moreover, contrary to Employer's assertion, the ALJ permissibly discounted the opinions of Drs. Dahhan and Broudy on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis. *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (a doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding the doctor's view on causation is independent of his mistaken belief the miner did not have pneumoconiosis); *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995); *Adams v. Director, OWCP*, 896 F.2d 818, 826 (6th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); Decision and Order at 18. We therefore affirm the ALJ's findings that Claimant established total disability due to legal pneumoconiosis and is entitled to benefits. 20 C.F.R. §718.204(c); Decision and Order at 27.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge