

U.S. Department of Labor

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



BRB No. 20-0386 BLA

DANIEL L. COOK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
T COAL COMPANY)	
)	
and)	
)	
SECURITY INSURANCE COMPANY OF)	DATE ISSUED: 08/27/2021
HARTFORD)	
)	
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 Richard M. Clark,
Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, 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) Richard M. Clark's Decision and Order Awarding Benefits (2018-BLA-05363) rendered on a claim filed on September 16, 2015, pursuant to Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 11.19 years of coal mine employment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.¹ 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, he found Claimant established legal pneumoconiosis,² a totally disabling respiratory impairment, and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). Thus, he awarded benefits.

On appeal, Employer contends the ALJ erred in finding Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis.³ Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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

¹ 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

² "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).

³ Employer further argues Claimant established "no more than" 10.3 years of coal mine employment. Employer's Brief at 13. Before the ALJ, however, Employer argued the evidence established 11.33 years of coal mine employment. Employer's Closing Brief at 4. Notwithstanding Employer's change in position, Employer acknowledges the difference in calculation makes no difference in the outcome of this case. Employer's Brief at 13. Any error in the method of calculation is therefore harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, we affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 Associates, Inc.*, 380 U.S. 359 (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. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but failure to establish any one precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.⁵ 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 ALJ considered the medical opinions of Drs. Forehand and Fino. Decision and Order at 14-15. Dr. Forehand diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) caused by a combination of coal mine dust exposure and cigarette smoking. Director’s Exhibits 8, 14-15. Dr. Fino opined Claimant does not have legal pneumoconiosis but an oxygenation impairment caused by cigarette smoking and unrelated to coal mine dust exposure. Director’s Exhibit 13; Employer’s

⁴ We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 24; Director’s Exhibit 3.

⁵ The ALJ found Claimant failed to establish clinical pneumoconiosis by the x-ray evidence and accorded little weight to Dr. Forehand’s opinion on the issue. Decision and Order at 13. He gave significant weight to Dr. Fino’s opinion that clinical pneumoconiosis is not present because it was consistent with the x-ray evidence. *Id.* at 13, 15. While the ALJ did not weigh all the different forms of evidence together to make a final conclusion regarding clinical pneumoconiosis, any potential error is harmless because, as discussed below, we affirm his determination that Claimant established legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 209 (4th Cir. 2000) (all types of relevant evidence must be weighed together to determine whether a preponderance of the evidence establishes pneumoconiosis); *Larioni*, 6 BLR at 1-1278.

Exhibit 1. The ALJ found Dr. Forehand's opinion well-reasoned and supported by the evidence of record. Decision and Order at 14-15. In contrast, he found Dr. Fino's opinion inadequately reasoned and entitled to little weight. *Id.* at 15. The ALJ thus found Claimant established legal pneumoconiosis. *Id.* at 16.

We initially reject Employer's assertion that the ALJ erred in failing to make a precise finding as to the number of years Claimant smoked. Employer's Brief at 12. The ALJ accurately summarized the smoking histories that each physician relied upon,⁶ along with Claimant's testimony, and rationally concluded it was not possible to determine Claimant's exact smoking history. Decision and Order at 6. He found, however, that the evidence establishes Claimant smoked for at least forty-five years at a rate of a half pack to one pack per day. *Id.* As this finding is supported by substantial evidence and Employer has not explained how it was prejudiced by the ALJ's finding that Claimant smoked at least a half pack to one full pack per day for forty-five years, we reject Employer's allegation of error. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174; *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer further contends the ALJ erred in finding Dr. Forehand's opinion sufficient to meet Claimant's burden to establish legal pneumoconiosis, asserting his opinion is unreasoned to the extent that he relied on an inaccurate smoking history. Employer's Brief at 13-15. Employer's arguments lack merit.

As the trier of fact, the ALJ is charged with determining the credibility of the evidence and whether a physician's opinion is adequately reasoned. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). As the ALJ noted, Dr. Forehand considered Claimant's work history, including the "extremely dusty" conditions at the face of the mine where he worked, Claimant's medical history, objective testing, and the additive nature of smoking and coal mine dust exposure, and explained why he concluded coal mine dust

⁶ The ALJ noted Claimant reported to Dr. Forehand that he smoked a half pack per day for thirty-seven years, and that he first reported to Dr. Fino that he smoked a pack per day for thirty-six years, but later told Dr. Fino he had smoked a pack per day since 1975 and had recently cut down to a few cigarettes per day. Decision and Order at 6; Director's Exhibits 8, 13; Employer's Exhibit 1. He further noted Claimant's testimony that he had smoked for forty-five years and may have smoked as much as a pack per day earlier in his life but had cut his smoking to six or seven cigarettes a day for quite a while. Decision and Order at 6; Hearing Transcript at 33-35.

exposure was a substantially contributing cause of Claimant's obstructive disease. Decision and Order at 14; Director's Exhibits 8, 15. Contrary to Employer's argument, the ALJ acknowledged Dr. Forehand considered a shorter smoking history of thirty-seven years at a rate of a half pack per day but permissibly found this did not undermine his opinion because Dr. Forehand "clearly acknowledged" Claimant's smoking history was "significant" and played a role in his respiratory impairment. Decision and Order at 15, n. 4; Director's Exhibits 8, 15. He thus permissibly found Dr. Forehand's opinion credible. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Employer also contends the ALJ erred in discrediting Dr. Fino's opinion that Claimant does not have legal pneumoconiosis, asserting he shifted the burden of proof to Employer to "rule out" coal mine dust exposure as contributing to Claimant's impairment. Employer's Brief at 15. It further argues Dr. Fino sufficiently explained his reasoning that Claimant's abnormalities were due solely to smoking and adequately considered Claimant's employment history. *Id.* at 15-16. We disagree.

As the ALJ noted, Dr. Fino opined Claimant's oxygen desaturation with exertion and reduction in diffusion is due entirely to smoking; he stated he could "rule out" coal mine dust exposure as a contributing factor to Claimant's impairment. Decision and Order at 15; Director's Exhibit 13; Employer's Exhibit 1. Contrary to Employer's argument, the ALJ did not discredit Dr. Fino's opinion for failing to rule out coal mine dust exposure; instead, the ALJ discredited his opinion because he failed to adequately support his opinion that coal mine dust exposure could not have contributed to or aggravated Claimant's oxygen transfer impairment. *See Compton*, 211 F.3d at 211; Decision and Order at 15. Dr. Fino excluded coal dust as a contributor because cigarette smoking can cause a decrease of oxygenation with exertion, even in the absence of COPD. Decision and Order at 15. The ALJ permissibly found Dr. Fino did not "point to any authority" to support his conclusion and failed to explain how he was able to determine coal mine dust exposure did not play an additive role in any oxygenation impairment caused by smoking. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 15.

Employer's assertion that Dr. Fino adequately explained his opinion is a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the ALJ's finding that Claimant established he has legal pneumoconiosis as it is supported by substantial evidence. 20 C.F.R. §718.202(a); Decision and Order at 16.

Disability Causation

Employer argues the ALJ erred in finding Claimant's total disability is due to legal pneumoconiosis. Employer's Brief at 16. We disagree. To establish disability causation, Claimant must prove 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 "[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).

Dr. Forehand opined Claimant is totally disabled by COPD. Director's Exhibits 8, 14-15. As discussed above, the ALJ permissibly relied on Dr. Forehand's opinion to find this disabling impairment is legal pneumoconiosis. Decision and Order at 14-15; Director's Exhibits 8, 14-15. We therefore see no error in his finding Claimant established legal pneumoconiosis is a substantially contributing cause of his total disability. *See Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 17.

Similarly, having already rejected Dr. Fino's opinion that Claimant does not have legal pneumoconiosis, the ALJ rationally rejected his opinion that legal pneumoconiosis did not cause Claimant's disability. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *citing Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (Where a physician erroneously fails to diagnose pneumoconiosis, his opinion on causation "may not be credited at all" absent "specific and persuasive reasons" for concluding it is independent of the mistaken belief the miner did not have the disease.); Director's Exhibit 13; Employer's Exhibit 1; Decision and Order at 15, 17.

As substantial evidence supports the ALJ's finding that Dr. Forehand's opinion is well-reasoned, and because it establishes legal pneumoconiosis substantially contributes to Claimant's disability, we affirm his finding of disability causation. 20 C.F.R. §718.204(c); Decision and Order at 17.

Accordingly, the ALJ'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