U.S. Department of Labor

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

BRB No. 21-0009 BLA

FRANK SCOTT LAKE Claimant-Respondent v. BLACK MOUNTAIN COAL MINING COMPANY, INCORPORATED and LIBERTY MUTUAL Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/16/2022 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Awarding Benefits (2015-BLA-05284) rendered on a subsequent claim filed on May 6, 2013,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.[2]

The Board previously vacated ALJ Daniel F. Solomon's award of benefits, holding he erred in admitting Dr. Ajjarapu's reports as supplemental medical reports to the Department of Labor's (DOL's) complete pulmonary evaluation.[3] *Lake v. Black Mountain Coal Mining,* BRB No. 17-0492 BLA, slip op. at 3-6 and n.6 (July 23, 2018) (unpub.). The

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[1] Claimant's prior claim, filed on November 28, 1994, was denied for failure to establish total disability. Director's Exhibit 1.

[2] We incorporate the procedural history of this case as set forth in *Lake v. Black Mountain Coal Mining,* BRB No. 17-0492 BLA (July 23, 2018) (unpub.). The Board previously affirmed that Claimant established thirteen years of coal mine employment, total disability, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309. The Board also affirmed that Claimant is not eligible for the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act because he has less than fifteen years of coal mine employment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Claimant selected Dr. Habre to examine him for the DOL. Director's Exhibit 11. Dr. Habre prepared an initial examination report on July 19, 2013 and also provided a supplemental report on October 1, 2013. Director's Exhibits 11, 13. The district director subsequently received additional medical evidence that was contrary to Dr. Habre's conclusions in his reports. Because Dr. Habre was unavailable to review this evidence, the district director requested that Dr. Ajjarapu re-examine Claimant without performing additional objective testing. Based upon her examination of Claimant, as well as her review of the reports of Drs. Habre and Dahhan, Dr. Ajjarapu prepared a July 14, 2014 report, diagnosing legal pneumoconiosis in the form of chronic bronchitis due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 17. Dr. Ajjarapu prepared a supplemental report on April 13, 2016, wherein she opined Claimant is totally disabled due to legal pneumoconiosis. Director's Exhibit 42.

Board also held ALJ Solomon erred in failing to determine Claimant's smoking history and in finding Claimant established legal pneumoconiosis. *Id.* at 4-5. Thus, the Board remanded the case for further consideration.

On remand, ALJ Applewhite (the ALJ) was assigned the case due to the unavailability of ALJ Solomon. She accepted the unopposed re-designation by the Director, Office of Workers' Compensation Programs (the Director), of Dr. Ajjarapu's two medical reports as constituting the DOL's complete pulmonary evaluation under 20 C.F.R. §725.406. However, the ALJ also designated, sua sponte, Dr. Habre's reports as "other evidence" under 20 C.F.R. §718.107. The ALJ found Claimant smoked at least twenty-five years and established he is totally disabled due to legal pneumoconiosis, based on Dr. Ajjarapu's opinion. She therefore awarded benefits.

On appeal, Employer argues the ALJ erred in admitting Dr. Habre's reports, in determining Claimant's smoking history, and in finding Claimant established legal pneumoconiosis and disability causation. The Director has declined to file a substantive response brief, but states the ALJ committed harmless error in admitting Dr. Habre's reports as "other evidence" at 20 C.F.R. §718.107. Director's Brief at 1 n.1. Claimant has not filed a response brief.

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).

Admission of Dr. Habre's Medical Reports

Employer correctly argues the ALJ erred in admitting Dr. Habre's reports. Employer's Brief at 3-4. The regulation at 20 C.F.R. §718.107(a) provides:

> The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or

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[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 on Remand at 2 n.2; Hearing Transcript at 20; Director's Exhibit 4.

> a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

20 C.F.R. §718.107(a). Because Dr. Habre's medical reports do not constitute results from an objective test or procedure not specifically addressed in the regulations, they are inadmissible as "other evidence" under 20 C.F.R. §718.107(a).

The ALJ's error is harmless, however, as it did not affect her decision. The ALJ did not weigh Dr. Habre's opinion against the opinions of Drs. Dahhan and Rosenberg, Employer's experts, in determining Claimant is totally disabled by legal pneumoconiosis. Director's Brief at 1 n.1. Thus, we reject Employer's contention that the case should be remanded for the ALJ to issue a new decision without reference to Dr. Habre's reports. *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); Decision and Order on Remand at 6-8.

Part 718 Entitlement

Without the benefit of the Section 411(c)(4) presumption, 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).

Smoking History

In evaluating the physicians' opinions on the disease element, based on their understanding of Claimant's smoking and occupational exposures, the ALJ found Claimant smoked for at least twenty-five years. Decision and Order on Remand at 2-3. Employer contends the ALJ failed to properly determine the rate at which Claimant smoked. Employer's Brief at 7. Employer also asserts Claimant smoked fifteen years longer than the ALJ found based on the results of Dr. Rosenberg's testing in 2015. *Id.* Employer's arguments lack merit.

Although the ALJ did not specify the rate at which Claimant smoked, all the physicians understood Claimant to have smoked one pack per day. Claimant testified at the hearing that he started smoking at age sixteen and quit in 2000, and "smoked about a pack a day." Hearing Transcript at 39. Dr. Ajjarapu reported Claimant smoked from

twenty-four to twenty-six pack-years. Director's Exhibit 17 at 2. Dr. Dahhan reported Claimant began smoking at age twenty, quit at age fifty, and thus had a thirty pack-year smoking history. Director's Exhibit 14 at 1. Dr. Rosenberg reported an approximate smoking history of twenty-five pack-years. Employer's Exhibits 2 at 5; 3 at 5.

Employer has not demonstrated any error in the ALJ's finding nor attempted to articulate why the ALJ was required to further specify Claimant smoked at a rate of one pack a day. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278. We therefore affirm that substantial evidence supports the ALJ's finding Claimant smoked for twenty-five years.[5] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 669-70 (4th Cir. 2017); Decision and Order on Remand at 2-3; Director's Exhibits 14 at 1; 17 at 2; Employer's Exhibits 2 at 5; 3 at 5; Hearing Transcript at 39.

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 Court of Appeals for the Sixth Circuit holds a miner can establish a lung impairment is significantly related to coal mine dust exposure "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 mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

Dr. Ajjarapu diagnosed Claimant with legal pneumoconiosis in the form of chronic bronchitis due to both smoking and coal mine dust exposure. Director's Exhibits 17 at 2; 42 at 1. Dr. Dahhan diagnosed chronic bronchitis and emphysema due to smoking and not coal mine dust exposure. Director's Exhibit 14 at 2-3. Finally, Dr. Rosenberg diagnosed Claimant with smoking-induced chronic obstructive pulmonary disease (COPD) unrelated

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[5] Employer notes Dr. Rosenberg conducted a carboxyhemoglobin test in 2015, which showed Claimant was still smoking fifteen years after he allegedly stopped. Employer's Exhibits 2 at 11; 3 at 11. But Dr. Rosenberg conceded he was unable to tell from Claimant's elevated carboxyhemoglobin level whether he continued to smoke or was being exposed to "secondhand smoke." Employer's Exhibits 2 at 5, 11; 3 at 5, 11. Dr. Rosenberg specifically relied on a smoking history of "around" twenty-five pack-years in rendering his opinion. Employer's Exhibit 2 at 5.

to coal mine dust exposure. Employer's Exhibits 2 at 11-12; 3 at 7-13. The ALJ credited Dr. Ajjarapu's opinion over the contrary opinions of Drs. Dahhan and Rosenberg. Decision and Order on Remand at 3-7.

Employer contends Dr. Ajjarapu's opinion is insufficient to satisfy Claimant's burden of proof because she indicated the effects of smoking and coal mine dust exposure in Claimant's respiratory impairment are indistinguishable.[6] Employer's Brief at 5-6. We disagree.

We see no error in finding Dr. Ajjarapu's opinion adequately explained, as it is based on Claimant's smoking and work histories[7] and is consistent with the DOL's position in the preamble to the 2001 revised regulations that the effects of smoking and coal mine dust may be additive in causing chronic obstructive lung disease. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett,* 478 F.3d 350, 356 (6th Cir. 2007); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

A physician need not apportion a miner's lung disease to various exposures to establish legal pneumoconiosis, provided she has credibly diagnosed a chronic respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (opinion that coal dust and smoking were both significant causal factors and that it was impossible to allocate between them establishes legal pneumoconiosis); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012) (physician's opinion that lung disease arose from "a combination of" coal mine dust exposure and smoking sufficient to establish legal pneumoconiosis). Because Dr. Ajjarapu specifically opined that coal mine dust exposure substantially

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[6] Dr. Ajjarapu opined the effects of coal mine dust exposure and smoking cannot be separated because smoking is a "compounding factor." Director's Exhibit 17 at 3. She described how coal dust "once inhaled" triggers inflammation and mucous secretions, and how, specifically in miners, smoking can compound "the inflammatory process." *Id.* As a result, Dr. Ajjarapu stated it is "virtually impossible" to determine the relative contribution of each source. *Id.*

[7] We also reject Employer's contention Dr. Ajjarapu's opinion is based on an inaccurate smoking history. Dr. Ajjarapu considered a smoking history of twenty-four to twenty-six pack-years, which is sufficiently consistent with the ALJ's finding of twenty-five years. *See Stallard*, 876 F.3d at 669-70; *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 n.2 (4th Cir. 2012); Decision and Order on Remand at 2-3; Director's Exhibits 17, 42.

aggravated Claimant's respiratory impairment, her opinion sufficiently establishes legal pneumoconiosis. *See Cornett*, 227 F.3d at 576-77; Director's Exhibit 17 at 3.

We further reject Employer's contention the ALJ erred in weighing the opinions of Drs. Dahhan and Rosenberg. The ALJ found that while Dr. Dahhan explained why smoking was generally harmful, he "did not discuss how the Claimant's coal mining history would interact with [his] smoking" in contributing to chronic bronchitis. Decision and Order on Remand at 6. Similarly, the ALJ noted Dr. Rosenberg excluded coal dust exposure as a causative factor for Claimant's COPD, based in part on his belief that Claimant's FEV1/FVC ratio on pulmonary function testing is more consistent with a smoking-related impairment. *Id.* The ALJ thus permissibly concluded neither doctor adequately addressed the potentially additive effects of coal mine dust exposure and smoking, and they failed to persuasively explain why coal mine dust exposure did not aggravate Claimant's respiratory impairment, even if it was caused primarily by smoking. *See* 65 Fed. Reg. at 79,940; *Barrett*, 478 F.3d at 356 (ALJ permissibly rejected physician's opinion where physician failed to adequately explain why coal mine dust exposure did not exacerbate a claimant's smoking-related impairment); Decision and Order on Remand at 6-7.

The ALJ's function is to weigh the evidence, draw appropriate inferences, and determine witness credibility. *See Tennessee 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). Employer requests the Board simply reweigh those findings which it is not empowered to do. *Anderson*, 12 BLR at 1-113. Thus, we affirm that Claimant established legal pneumoconiosis.[8] 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Decision and Order on Remand at 7.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary

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[8] Because we affirm the ALJ's finding that Dr. Ajjarapu's opinion is entitled to greatest weight, we need not address Employer's contention that the ALJ erred in also finding Dr. Habre's opinion supportive of a finding of legal pneumoconiosis. Decision and Order on Remand at 8; Employer's Brief at 5-6.

impairment.[9] 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).

Employer raises the same arguments on disability causation that it did regarding legal pneumoconiosis. But all the doctors agree Claimant is totally disabled by an obstructive respiratory impairment. Decision and Order on Remand at 7-8; Director's Exhibits 14 at 2-3; 17 at 2; 42 at 1; Employer's Exhibits 2 at 11-12; 3 at 7-13. And we have affirmed that the ALJ permissibly determined Claimant's disabling obstructive impairment is legal pneumoconiosis. *See Rowe*, 710 F.2d at 255; Decision and Order on Remand at 3-7; *see above* at 7. Legal pneumoconiosis therefore is the 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 County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order on Remand at 7-8.

Accordingly, we affirm the ALJ's Decision and Order on Remand Awarding Benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] Previously, ALJ Solomon found Claimant has a totally disabling obstructive impairment based on the unanimity of the medical opinions. *Lake*, BRB No. 17-0492 BLA, slip op. at 3 n.5; 2017 Decision and Order at 3 n.5.