**U.S. Department of Labor**

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

BRB No. 20-0328 BLA

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| CLARENCE M. JOHNSON | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| RUBY COAL COMPANY OF LONDON, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN RESOURCES INSURANCE COMPANY | ) | DATE ISSUED: 07/29/2021 |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Clarence M. Johnson, Corbin, Kentucky.

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

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

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Steven D. Bell's Decision and Order Denying Benefits (2018-BLA-05764) rendered on a claim filed on October 26, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 7.06 years of coal mine employment and therefore found he could not invoke the 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, the administrative law judge found that although Claimant established clinical pneumoconiosis and a totally disabling respiratory or pulmonary impairment, he did not establish legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b). He also found Claimant did not establish total disability due to clinical pneumoconiosis, and thus denied benefits. 20 C.F.R. §718.204(c).

On appeal, Claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated

[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the administrative law judge's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] 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); *see* 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 11.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Length of Qualifying Coal Mine Employment**

Because the administrative law judge's determination of Claimant's length of coal mine employment is relevant to whether Claimant can invoke the Section 411(c)(4) presumption, we will review his finding that Claimant worked 7.06 years in coal mine employment. 20 C.F.R. §718.305(b)(i).

Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710 (1985). The Board will uphold an administrative law judge's determination on the length of coal mine employment if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In determining the length of Claimant's coal mine employment, the administrative law judge considered his Social Security Administration (SSA) earnings records, his application for benefits,[4] and his hearing testimony.[5] Decision and Order at 4-7; Director's Exhibits 2, 5, 6; Hearing Tr. at 13-16. He noted Claimant alleged twenty years of coal mine employment, while the district director found only seven years established. Decision and Order at 4; Director's Exhibits 2, 43.

For the years 1972, 1973, and 1977, the first quarter of 1975, and the first and fourth quarters of 1976, the administrative law judge permissibly credited Claimant with a quarter of a year for each quarter in which his SSA records reflect he earned at least $50.00 from

[4] While Claimant's Department of Labor Employment History form lists the coal companies that employed him, it does not indicate the dates he worked for them, except for his employment with Farrell Mining Company from 1970 to 1971. Director's Exhibit 3. Claimant's Social Security Administration (SSA) earnings records demonstrate, however, that he worked at Farrell Mining Company during the third and fourth quarters of 1972 and the first quarter of 1973. Director's Exhibit 5.

[5] Although Claimant testified at the hearing for this claim, the only testimony he provided as to the length of his coal mine employment was that he worked for Ruby Coal Company for about two and one-half years and that he thinks he quit in 1984. Hearing Tr. at 13, 16.

coal mine operators.[6] *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019); *Tackett v. Director,* OWCP, 6 BLR 1-839, 1-841 (1984); Decision and Order at 5-6. Thus he rationally credited Claimant with a total of ten quarters or 2.5 years of coal mine employment for these time periods.

In calculating Claimant's remaining coal mine employment in 1974, the last three quarters in 1975, the second and third quarters in 1976,[7] and the years 1979 through 2009, the administrative law judge permissibly applied the method of calculation at 20 C.F.R. §725.101(a)(32)(iii).[8] *See Shepherd*, 915 F.3d at 400-03; Decision and Order at 6-7. He divided Claimant's annual earnings for these years as set forth in his SSA earnings records by the yearly average wage for 125 days as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Decision and Order at 7. Where Claimant's wages exceeded the 125-day average, the administrative law judge credited him with a full year of coal mine employment. *Id*. Where Claimant's earnings fell below the 125-day average, the administrative law judge credited him with a fractional year. *Id*. Applying this method of calculation, he rationally found Claimant established 4.56 years of coal mine employment for 1974, the last three quarters in 1975, the second and third quarters in 1976, and the years 1979 through 2009. *Shepherd*, 915 F.3d at 400-03; Decision and Order at 6-7. Because it is supported by substantial evidence,

[6] Prior to 1978, the SSA reported annual earnings on a quarterly basis.

[7] For the year 1974, the last three quarters in 1975, and the second and third quarters in 1976, the administrative law judge determined the SSA records reflect significant non-coal mine employment mixed with coal mine employment. Decision and Order at 5-6. Thus he permissibly declined to apply the quarterly method, and calculated Claimant's coal mine employment for those periods based on the method of calculation at 20 C.F.R. §725.101(a)(32)(iii). *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019) (holding the quarter method cannot be used if the evidence establishes "the miner was not employed by a coal mining company for a full calendar quarter").

[8] The regulation provides that if the beginning and ending dates of a miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.

we affirm the administrative law judge's finding that Claimant established a total of 7.06 years of coal mine employment for the years 1972 to 2009.[9] *Id.*

As we detect no error in the administrative law judge's finding that Claimant has fewer than fifteen years of coal mine employment, we affirm his finding that Claimant did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i).

**20 C.F.R. Part 718**

Without the assistance of any statutory presumptions,[10] 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 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,[11] Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust

[9] The administrative law judge also considered Dr. Broudy's notation in his report that Claimant began working in the mines at age nine and worked at least ten years until age twenty-five as a heavy equipment operator, and then hauled coal for five or six years until he was thirty-one or thirty-two years old. Decision and Order at 7; Director's Exhibit 17. He permissibly found Claimant's employment history form, SSA earnings records, and hearing testimony did not support this work history. *See Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003) (administrative law judge's duty is to resolve conflicting evidence in the record on the issue of length of coal mine employment); Decision and Order at 7.

[10] The administrative law judge correctly found Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 because there is no evidence in the record Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3); Decision and Order at 19.

[11] "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

exposure in coal mine employment." 20 C.F.R. §718.201(b). The United States Court of Appeals for the Sixth Circuit holds a miner can establish a lung disease or 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 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.'").

The administrative law judge considered the medical opinions of Drs. Ajjarapu, Broudy, and Dahhan.[12] 20 C.F.R. §718.202(a)(4); Decision and Order at 12-17, 20-23. Dr. Ajjarapu opined Claimant has legal pneumoconiosis in the form of chronic bronchitis significantly related to coal mine dust exposure and cigarette smoking. Director's Exhibit 10. Dr. Broudy opined Claimant does not have legal pneumoconiosis but has a severe respiratory impairment due to his "heavy lifelong cigarette smoking and morbid obesity." Director's Exhibits 17, 18; Employer's Exhibit 6. Dr. Dahhan opined Claimant does not have legal pneumoconiosis but has an obstructive ventilatory impairment caused by severe emphysema due to smoking. Employer's Exhibit 4.

We discern no error in the administrative law judge's weighing of Dr. Ajjarapu's opinion. She diagnosed chronic bronchitis based on Claimant's "symptoms of daily cough and sputum production." Director's Exhibit 10. She concluded Claimant's coal mine dust exposure and cigarette smoking contributed to his chronic bronchitis because "both cause airway inflammation leading to bronchospasm, excessive airway secretions, and bronchitic symptoms." *Id.* The administrative law judge permissibly found Dr. Ajjarapu failed to adequately explain why Claimant's chronic bronchitis is significantly related to, or substantially aggravated by, coal mine dust exposure.[13] *See Tenn. Consolidation Coal Co.*

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significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[12] There is no evidence in the treatment records that Claimant has legal pneumoconiosis. Director's Exhibit 9; Claimant's Exhibit 5; Employer's Exhibits 2, 5. Treatment records from Premier Heart and Vascular Centers in London, Kentucky; East Bernstadt Medical Clinic in East Bernstadt, Kentucky; and Pulmonology and Sleep Specialists in London, Kentucky listed chronic obstructive pulmonary disease and chronic obstructive asthma but did not specify a cause for either disease. *Id*.

[13] We are not persuaded by our dissenting colleague's opinion that Dr. Ajjarapu rendered a separate diagnosis of legal pneumoconiosis sufficient to meet Claimant's burden of proof, independent of whether his chronic bronchitis is also due to coal mine dust exposure. In her November 23, 2016 report, Dr. Ajjarapu listed two conditions under the

*v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 21-22. Further, the administrative law judge correctly found Dr. Broudy's and Dr. Dahhan's opinions cannot aid Claimant in establishing legal pneumoconiosis. Decision and Order at 23; Director's Exhibits 17, 18; Employer's Exhibit 4. We therefore affirm the administrative law judge's finding that Claimant failed to establish the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 23.

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heading "Cardio-Pulmonary Diagnosis": chronic bronchitis and simple coal workers pneumoconiosis. Director's Exhibit 10. She explained the etiology of each of those two diagnoses under the heading "Etiology of Cardiopulmonary Diagnosis(es) #7 Form CM-988" (Form CM 988, item 7 instructs the physician to describe the causes of each pulmonary diagnosis and the contribution of the patient's occupational dust exposure to his/her pulmonary condition). *Id*. The impairments which our colleague argues the administrative law judge should have considered as separate diagnoses constituting legal pneumoconiosis were not listed as diagnoses by Dr. Ajjarapu, and she provided no explanation as to how they individually were linked to coal mine dust exposure. *Id*. The impairments appear only under the report heading "Impairment *8 Form CM-988 a. Degree of *severity* of impairment." *Id*. Dr. Ajjarapu's response under that heading is: "As stated in the summary of diagnostic testing - see above. Spirometry shows severe pulmonary impairment, arterial blood gases show moderate hypoxemia, no acute abnormalities on EKG, chest x-ray showing simple [coal workers' pneumoconiosis], normal physical exam with respect to lungs." *Id*. Under the heading "Impairment #8 Form CM - 988 b. Extent to which each *diagnosi*s contributed to impairment," (emphasis added) she stated, "[b]ased on the overall evaluation, he meets DOL criteria for total and complete pulmonary impairment. His impairment is due in part to his work in the mines and he doesn't have the pulmonary capacity to do his previous coal mine employment." *Id*. Given this information, the administrative law judge permissibly interpreted and analyzed Dr. Ajjarapu's opinion. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value). Further, contrary to our dissenting colleague's opinion, the administrative law judge permissibly determined Dr. Ajjarapu did not render a reasoned medical opinion that by definition establishes Claimant's legal pneumoconiosis is a substantially contributing cause of his disability. *Tenn. Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); 20 C.F.R. §718.204(c); Decision and Order at 21-24.

**Disability Causation**

The administrative law judge next found the evidence did not establish Claimant is totally disabled due to clinical pneumoconiosis.[14] 20 C.F.R. §718.204(c); Decision and Order at 24-25. He articulated and applied the proper standard under the regulations for establishing disability causation, i.e., a claimant must establish pneumoconiosis is 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 24. He further recognized pneumoconiosis is a "substantially contributing cause" of a miner's disability 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); Decision and Order at 24.

He then considered Dr. Ajjarapu's opinion. She diagnosed both clinical pneumoconiosis and legal pneumoconiosis in the form of chronic bronchitis. Director's Exhibit 10. She opined Claimant's "total and complete pulmonary impairment was due in part to his work in the mines." *Id*. The administrative law judge permissibly found that, because Dr. Ajjarapu did not opine Claimant's clinical pneumoconiosis is "a substantially contributing cause of his disability," her opinion is insufficient to establish Claimant's total disability is due to pneumoconiosis. *Groves*, 761 F.3d at 599 (noting "a miner must show that his pneumoconiosis was 'a substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment"); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 24. We therefore affirm the administrative law judge's finding that Claimant failed to establish his total disability is due to pneumoconiosis as this determination is rational and supported by substantial evidence. 20 C.F.R. §718.204(c); Decision and Order at 24.

Because Claimant failed to establish disability causation, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[14] "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).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. In finding Dr. Ajjarapu's opinion insufficient to establish that Claimant has legal pneumoconiosis or that his totally disabling impairment is due to pneumoconiosis, the administrative law judge committed two errors requiring remand.

*First*, the administrative law judge failed to consider the entirety of Dr. Ajjarapu's opinion on legal pneumoconiosis. Although he rejected her statement that Claimant's disease of chronic bronchitis constitutes legal pneumoconiosis, Decision and Order at 21-22, he did not weigh her additional diagnosis of a "severe" impairment on pulmonary function testing and "moderate" hypoxemia on arterial blood gas testing "due in part to [Claimant's] coal mine employment." Director's Exhibit 10 at 7. This pulmonary impairment, which Dr. Ajjarapu deemed "total and complete," constitutes a separate diagnosis of legal pneumoconiosis sufficient to meet Claimant's burden of proof, independent of whether his chronic bronchitis is also due to coal dust exposure. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598–99 (6th Cir. 2014) (miner can establish legal pneumoconiosis "by showing that his disease was caused 'in part' by coal mine employment"); 20 C.F.R. §718.201(a)(2) (defining "legal pneumoconiosis as "any chronic lung disease *or impairment* . . . arising out of coal mine employment") (emphasis added). The administrative law judge's failure to consider this aspect of Dr. Ajjarapu's opinion requires remand. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (administrative law judge has duty to consider all of the evidence and make findings of fact

and conclusions of law which adequately set forth the factual and legal basis for his decision); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

*Second*, the administrative law judge erred in finding Dr. Ajjarapu's opinion legally insufficient to establish that his totally disabling pulmonary impairment is due to pneumoconiosis. Although he faulted her for not mimicking the specific regulatory language that Claimant's pneumoconiosis "is a substantially contributing cause" of his totally disabling impairment, Decision and Order at 24, her opinion, if credited, satisfies that requirement. 20 C.F.R. §718.204(c) (pneumoconiosis is a "substantially contributing cause" of a miner's disability if it "has a material adverse effect on" or "materially worsens" the miner's pulmonary condition). As discussed, Dr. Ajjarapu's attribution of Claimant's "total and complete pulmonary impairment" in part to coal dust exposure constitutes an opinion that his total disability *is legal pneumoconiosis*; thus, by definition, her opinion can support a finding that legal pneumoconiosis is a substantially contributing cause of that disability. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016) (physician's opinion that a miner has a totally disabling pulmonary impairment supports disability causation if that impairment is found to be legal pneumoconiosis).

Based on these errors, I would vacate the denial of benefits and remand the claim for the administrative law judge to reconsider the weight given to Dr. Ajjarapu's opinion on legal pneumoconiosis and disability causation.

GREG J. BUZZARD
Administrative Appeals Judge