



BRB No. 22-0286 BLA

REBECCA SARGENT (o/b/o The Estate of)
RUTH BLANKENSHIP, Widow of)
HARLON D. BLANKENSHIP))

Claimant-Petitioner)

v.)

CLINCH VALLEY COAL COMPANY)

and)

PITTSTON COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 7/18/2023

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Jonathan
C. Calianos, Administrative Law Judge, United States Department of Labor.

Rebecca Sargent, Lebanon, Virginia.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for
Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,¹ Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Denying Benefits on Remand (2014-BLA-05034) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on September 13, 2011,² and is before the Benefits Review Board for the second time.

In his initial Decision and Order Denying Request for Modification,³ the ALJ found the Miner had 8.32 years of coal mine employment and thus Claimant 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).⁴ Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the Miner had clinical pneumoconiosis and was totally disabled. 20 C.F.R. §§718.202(a), 718.204(b)(2). However, he found the evidence insufficient to establish legal pneumoconiosis or that the Miner was totally disabled due to either clinical or legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(c).

¹ The Miner died on June 21, 2016. May 2, 2018 Hearing Transcript at 11. The Miner's widow, Ruth Blankenship, pursued the claim until her death on December 17, 2019. February 16, 2022 Hearing Transcript at 6. Claimant, the daughter of the Miner, is now pursuing the claim. On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board (Board) review the ALJ's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

² ALJ Sheldon R. Lipson denied the Miner's initial claim on September 24, 1996, for failure to establish disability causation. Director's Exhibit 1.

³ This case involves a request for modification of a district director's denial of benefits. Director's Exhibit 28. In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

⁴ 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Accordingly, the ALJ found Claimant did not establish a change in an applicable condition of entitlement and denied benefits.⁵

In consideration of Claimant's appeal, the Board affirmed the ALJ's findings that the Miner was totally disabled but Claimant could not invoke the Section 411(c)(4) presumption because the Miner had fewer than fifteen years of coal mine employment. *Blankenship v. Clinch Valley Coal Co.*, BRB No. 20-0510 BLA, slip op. at 5 (Oct. 29, 2021). The Board further affirmed the ALJ's determinations that the Miner had clinical pneumoconiosis but Claimant did not establish total disability due to clinical pneumoconiosis at 20 C.F.R. §718.204(c). However, the Board held the ALJ did not sufficiently explain his rejection of Dr. Habre's opinion that the Miner had legal pneumoconiosis and thus vacated the denial of benefits and remanded the case for further consideration of the issues of legal pneumoconiosis and disability causation.⁶ *Id.* at 9-10.

On remand, the ALJ again found Dr. Habre's opinion insufficient to establish the Miner had legal pneumoconiosis and was totally disabled due to the disease. Therefore, the ALJ denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, did not file a brief.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergyMines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational,

⁵ When 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 he 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 the Miner did not establish disability causation in his prior claim, Claimant had to submit evidence establishing this element in order to obtain review of the merits of the Miner's current claim. *Id.*

⁶ The Board affirmed the ALJ's rejection of Dr. Fino's opinion that the Miner did not have legal pneumoconiosis. *Blankenship v. Clinch Valley Coal Co.*, BRB No. 20-0510 BLA, slip op. at 6-7 (Oct. 29, 2021).

supported by substantial evidence, and in accordance with law.⁷ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis arose out of coal mine employment); total 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, 1-2 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate the Miner had 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).

In his initial report, Dr. Habre relied upon a coal mine employment history of seventeen years and a cigarette smoking history of sixty pack-years. Director’s Exhibit 11 at 5. He diagnosed the Miner with a disabling lung disease evidenced by severe resting hypoxemia on arterial blood gas testing and severe obstruction on pulmonary function testing. *Id.* at 6-8. He stated “coal mining as well as smoking [led] to [the Miner’s] decline in spirometric parameter and caused his pulmonary impairment. Coal mine dust [played] a substantial and a contributing role in his clinical symptoms and all his clinical findings, including the presence of disabling lung disease.” *Id.*

In a supplemental report, Dr. Habre noted the district director asked him to clarify his opinion, relying instead upon a coal mine employment history of 6.87 years. Director’s Exhibit 11 at 21. He reiterated the pulmonary function and arterial blood gas testing showed the Miner had disabling lung disease prior to his death. *Id.* He opined “based on the occupational history of 6.87 years of underground mining, the “major determinant and etiology [of that] disabling lung disease”; coal mine dust had “a material effect” although it was “not the primary cause.” *Id.* Dr. Habre again diagnosed clinical and legal pneumoconiosis, explaining that coal mine dust was a “small contributing factor” but it did

⁷ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibits 5, 6.

not have “a strong substantial role” in causing the Miner’s symptoms, pulmonary function, and blood gas abnormalities. *Id.*

The ALJ found Dr. Habre’s opinion conclusory as to “how [the Miner’s] coal dust exposure contributed to his specific pulmonary conditions.” Decision and Order on Remand at 6-7. He considered Dr. Habre’s lack of explanation “particularly concerning” given the Miner’s “relatively limited coal dust exposure [history] of less than ten years and the substantial 50 pack-year smoking history.” *Id.* at 7. Moreover, the ALJ noted it “is not entirely clear” which specific lung conditions Dr. Habre attributes to coal mine dust exposure in concluding he has legal pneumoconiosis.⁸ *Id.* at 7 n.5.

As the ALJ acted within his discretion in finding Dr. Habre not-well reasoned, and there is no other medical opinion to satisfy Claimant’s burden of proof, we affirm the ALJ’s conclusion that Claimant did not establish legal pneumoconiosis. *See* 20 C.F.R. §718.202(a); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17 (4th Cir. 2012) (it is for the ALJ to evaluate the proper weight to accord medical opinions); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000) (same); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (a reviewing court may not set aside a finding “merely because it finds the opposite conclusion more reasonable”); Decision and Order on Remand at 8.

Disability Causation

To establish disability causation, Claimant must prove that pneumoconiosis was a “substantially contributing cause” of the Miner’s totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is considered to have been a substantially contributing cause of a miner’s totally disabling impairment if it had “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); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

Because we have affirmed the ALJ’s finding that Claimant failed to establish legal pneumoconiosis, we also affirm his determination Claimant failed to establish the Miner

⁸ The ALJ specifically noted Dr. Habre stated in his initial report that the Miner’s chronic obstructive pulmonary disease (COPD) was solely related to smoking and only his chronic bronchitis represented legal pneumoconiosis, but he made no mention of chronic bronchitis in his supplemental report and “suggested that coal dust exposure contributed to the COPD.” Decision and Order at 7 n.5. Thus, the ALJ found these factors “further weaken[ed] the persuasiveness of his opinions.” *Id.*

was totally disabled due pneumoconiosis and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(c), 725.309(c); Decision and Order on Remand at 8. We thus affirm the ALJ's denial of benefits. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-271.

Accordingly, the ALJ's Decision and Order Denying Benefits on Remand is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge