



BRB No. 19-0201 BLA

DALE L. ALLEN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND CREEK KENTUCKY MINING)	
COMPANY)	
)	
and)	
)	DATE ISSUED: 05/27/2020
ISLAND CREEK COAL COMPANY)	
)	
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 and Order Denying Reconsideration of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2013-BLA-05933) and Order Denying Reconsideration of Administrative Law Judge Timothy J. McGrath rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on September 19, 2012.¹

Because the administrative law judge credited claimant with less than fifteen years of coal mine employment,² he found claimant could not invoke the presumption he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.³ 30 U.S.C. §921(c)(4) (2012). Considering claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found the new evidence established legal pneumoconiosis⁴ and a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 725.309(c). He further found claimant has a totally disabling respiratory or pulmonary impairment due to pneumoconiosis, 20 C.F.R. §718.204(b)(2), (c), and awarded benefits.⁵

On appeal, employer contends the administrative law judge erred in finding the evidence established legal pneumoconiosis and a totally disabling respiratory impairment.

¹ Claimant's initial claim, filed on October 4, 1994, was denied by reason of abandonment. Director's Exhibit 1. The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

² The administrative law judge credited claimant with "at most, a little more than fourteen years of coal mine employment." Decision and Order at 6.

³ 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 coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

⁴ The administrative law judge found the evidence did not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a).

⁵ In an Order Denying Reconsideration dated December 18, 2018, the administrative law judge denied employer's motion to have the case reassigned to a different administrative law judge because employer failed to timely raise its challenge that the administrative law judge was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.

Employer also contends the administrative law judge erred in not making a finding regarding whether claimant's total disability is due to legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits and Order Denying Reconsideration if they are 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (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. 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).

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(b). The United States Court of Appeals for the Sixth Circuit holds that a miner can establish a lung impairment 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).

The administrative law judge considered the medical opinions of Drs. Sood, Houser, Chavda, Selby, and Castle. Drs. Sood, Houser, and Chavda diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and cigarette smoking. Director's Exhibit 16 at 29; Claimant's Exhibits 5 at 3; 9 at 20; Employer's Exhibit 3 at 34-35. Conversely, Drs. Selby and Castle did not diagnose legal pneumoconiosis; they diagnosed a restrictive lung disease due to a

⁶ Claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

lobectomy⁷ and obesity.⁸ Employer's Exhibits 5, 7, 14, 15.

Dr. Sood stated claimant's coal mine dust exposure was of significant duration to be a substantial contributory cause, along with his cigarette smoking, to his COPD. Decision and Order at 30. The administrative law judge found his view "thorough, detailed, well-reasoned, and supported by the objective medical evidence as well as reliance on scientific studies" and accorded it substantial weight. *Id.* He thus concluded Dr. Sood's opinion, supported by Drs. Houser and Chavda, established legal pneumoconiosis. *Id.*

Employer does not challenge the administrative law judge's determination claimant has obstructive lung disease.⁹ Decision and Order at 29. We therefore affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983). Employer instead argues Dr. Sood's opinion on the cause of claimant's COPD does not satisfy claimant's burden of proof to establish legal pneumoconiosis. Employer's three arguments are without merit.

Employer characterizes Dr. Sood's opinion as a conclusion that since coal mine dust exposure can cause COPD it must have done so in this case. Employer's Brief at 12. We disagree. Dr. Sood explained claimant's coal mine dust exposure was of adequate duration and intensity to substantially contribute to his COPD. Claimant's Exhibit 9 at 16. The administrative law judge also found Dr. Sood provided reasoned explanations for ruling

⁷ The upper lobe of claimant's right lung was removed due to a fungal infection. Hearing Transcript at 46.

⁸ Drs. Sood, Houser, and Chavda also diagnosed a restrictive pulmonary impairment due to obesity. Claimant's Exhibit 9a at 2; Employer's Exhibits 3 at 27, 35; 4 at 13.

⁹ The administrative law judge noted Dr. Sood based his diagnosis of chronic obstructive pulmonary disease (COPD) on consistent chronic progressive respiratory symptoms, reduced exercise intolerance, use of medications as standard treatment for COPD, a diagnosis of COPD by his physicians, a September 19, 2012 x-ray showing emphysema, a March 19, 2013 computed tomography scan showing emphysematous changes, lung volume measurements showing air trapping, and a moderately reduced diffusing capacity. Decision and Order at 29; Claimant's Exhibits 9, 10. The administrative law judge credited Dr. Sood's diagnosis of COPD based on the doctor's "thorough discussion of the relationship between the test results and [c]laimant's obesity." Decision and Order at 29.

out claimant's obesity and a lobectomy as potential causes of his obstructive impairment.¹⁰ *Id.*

The determination as to whether a physician's report "is sufficiently documented and reasoned is essentially a credibility matter" and therefore "it is for the factfinder to decide." *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge found Dr. Sood set forth the rationale for his opinion, based on his interpretation of the medical evidence, and explained why claimant's coal mine dust exposure substantially contributed to his COPD. Substantial evidence supports the administrative law judge's permissible credibility determination. *See Rowe*, 710 F.2d at 255. We therefore affirm Dr. Sood's opinion is sufficient to establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Groves*, 761 F.3d at 598-99; *Rowe*, 710 F.2d at 255.

We further reject employer's contention Dr. Sood's opinion is based on an inflated coal mine employment history. Employer's Brief at 22-24. Dr. Sood relied upon a coal mine employment history of "14+ years," a finding almost identical to the administrative law judge's finding of "at most, a little more than fourteen years of coal mine employment." Decision and Order at 6; Claimant's Exhibit 9 at 2.

Employer finally contends that because Dr. Sood does not distinguish between the effects of smoking and coal mine dust, or exclude the possibility of smoking as the sole cause, he cannot logically conclude that coal mine dust substantially contributed to claimant's COPD. Employer's Brief at 14-15. We disagree. A physician need not apportion a miner's lung disease to various exposures to establish legal pneumoconiosis, provided he 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-

¹⁰ Dr. Sood stated claimant's lobectomy "would not explain away his moderate spirometric impairment, progressive restriction on lung volumes, and moderately reduced and progressive diffusing capacity." Claimant's Exhibit 10 at 3. He further explained claimant's obesity was an unlikely explanation for his reduced diffusing capacity, because that condition should be considered caused by intrinsic lung disease in adults. *Id.* Dr. Sood also relied on claimant's lung function results, noting claimant was morbidly obese in 1994, but had normal spirometry results. *Id.* Dr. Sood observed that claimant's substantial weight loss in March 2013 did not improve his pulmonary function results, nor did his significant weight gain in September 2013 lower them. *Id.*

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). The administrative law judge reasonably found Dr. Sood’s opinion that both coal mine dust exposure and smoking contributed to claimant’s COPD sufficient to establish claimant has “a respiratory impairment related at least in part to his history of coal mine dust exposure.” Decision and Order at 30; see *Groves*, 761 F.3d at 598-99.

Given our findings, we need not address employer’s argument the administrative law judge erred in not explaining why he rejected the opinions of Drs. Selby and Castle that claimant does not have legal pneumoconiosis. Employer’s Brief at 16. We have affirmed, as unchallenged, the administrative law judge’s finding that claimant has COPD. Neither Dr. Selby nor Dr. Castle diagnosed the condition; they concluded claimant has only restrictive disease. Employer’s Exhibits 14 at 24, 40; 15 at 30. Therefore employer has not explained how their opinions undermine Dr. Sood’s conclusion that claimant’s coal mine dust exposure substantially contributed to his COPD. 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”). Similarly, employer’s contention that the administrative law judge erred in finding the opinions of Drs. Houser and Chavda supportive of Dr. Sood’s opinion without addressing their reasoning does not undermine his determination that Dr. Sood’s opinion was adequately reasoned. *Id.* We therefore affirm the administrative law judge’s finding the medical opinions established legal pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4); *Groves*, 761 F.3d at 598-99.

Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. See 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.¹¹ 20 C.F.R. §718.204(b)(2)(i)-(iv).

Employer asserts the opinions of claimant’s physicians were based on an inaccurate

¹¹ The administrative law judge found the pulmonary function studies and blood gas studies did not establish total disability. He further found no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 31. Additionally, the administrative law judge found claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis because he did not establish that he has complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 35-36.

understanding of the exertional requirements of claimant's usual coal mine employment. Employer's Brief at 17-23. But we are unable to address employer's contention because the administrative law judge erred in not making a finding as to the exertional requirements of claimant's usual coal mine employment. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996). We must therefore vacate the administrative law judge's finding the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge must determine the exertional requirements of claimant's usual coal mine employment. *See Cornett*, 227 F.3d at 576; *Ward*, 93 F.3d at 218-19. He must then consider the physicians' opinions regarding total disability in light of those requirements and their understanding of those requirements. *Id.* In determining whether the physicians' opinions are reasoned, he must take into account the explanations given for their findings, the documentation underlying their judgments,¹² and the sophistication and bases for their diagnoses. *See Rowe*, 710 F.2d at 255.

Total Disability Due to Pneumoconiosis

The administrative law judge found that claimant was "entitled to invocation of the presumption under [20 C.F.R. §718.305] that he is totally disabled due to pneumoconiosis." Decision and Order at 35. However, the administrative law judge previously correctly found that because claimant established less than fifteen years of coal mine employment, he is not entitled to invocation of the Section 718.305 presumption. *See* Decision and Order at 25. Thus, the administrative law judge's basis for finding that claimant's total disability is due to pneumoconiosis cannot be affirmed. When an administrative law judge fails to make important and necessary factual findings, the proper course for the Board is to remand the case to the administrative law judge rather than attempting to fill the gaps. *See Rowe*, 710 F.2d at 255. We therefore vacate the administrative law judge's finding that claimant's total disability was due to pneumoconiosis, and remand the case for further consideration. 20 C.F.R. §718.204(c).

On remand, if the administrative law judge finds the evidence establishes total disability, he must determine whether the evidence establishes that claimant's legal

¹² Employer notes that Dr. Chavda based his opinion in part on pulmonary function studies Dr. Houser conducted on August 28, 2012, and September 5, 2013. Employer's Brief at 19; Director's Exhibit 49; Employer's Exhibit 3. Employer contends these studies are invalid. *Id.* Employer, however, failed to raise the issue of the validity of these studies before the administrative law judge and, thus, has waived its objection to the quality of this evidence. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

pneumoconiosis is a “substantially contributing cause” of his totally disabling respiratory or pulmonary impairment.¹³ 20 C.F.R. §718.204(c)(1); *see Groves*, 761 F.3d at 599-601.

Accordingly, the administrative law judge’s Decision and Order Awarding Benefits and Order Denying Reconsideration are affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

¹³ Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it:

- (i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or
- (ii) Materially 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).