**U.S. Department of Labor**

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

BRB No. 17-0515 BLA

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| PATRICIA PERRY<br>(o/b/o CHARLES C. PERRY)[1] | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| DOMINION COAL CORPORATION | ) | DATE ISSUED: 11/30/2020 |
| Employer-Petitioner | ) | |
| 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 William T. Barto, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for Employer.

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

[1] Some documents in the record refer to Claimant and the Miner as Patricia and Charles "Peery," not "Perry." The Board uses the last name "Perry" as it is consistent with the administrative law judge's captioning of the case, the Miner's Social Security Administration records, and his application for benefits.

PER CURIAM:

Employer appeals Administrative Law Judge William T. Barto's Decision and Order Awarding Benefits (2015-BLA-05759) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves the Miner's subsequent claim filed on May 10, 2013,[2] and his request for modification of the district director's denial of benefits.

The administrative law judge credited the Miner with at least seventeen years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant[3] established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4)(2018); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption, Claimant established a basis for modification, and granting modification renders justice under the Act. The administrative law judge therefore awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response. Employer has filed a reply brief, reiterating its contentions.[5]

[2] The Miner filed two prior claims, each of which was denied. Director's Exhibits 1, 2. The district director denied the current claim and the Miner's two modification requests because he did not establish total disability. Director's Exhibits 18a, 23.

[3] Claimant is the widow of the Miner who died on November 17, 2015 while his case was pending before the Office of Administrative Law Judges. Claimant is pursuing the Miner's claim on his behalf. Claimant's Exhibit 1.

[4] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that the Miner was totally disabled due to pneumoconiosis if she establishes he had 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.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that: Claimant established total disability; invoked the Section 411(c)(4) presumption; established a change in an applicable condition of entitlement; and established a basis for modification of the district director's denial of benefits. *See* 20 C.F.R. §§ 718.204(b)(2),

The Board's scope of review is defined by statute. 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.[6] 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).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish that the Miner had neither legal nor clinical pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that Employer failed to establish rebuttal by either method.

Employer's concession that the Miner had clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i); Decision and Order at 12; Employer's Brief at 11 n.2. However, because legal pneumoconiosis is relevant to the second method of rebuttal, we address the administrative law judge's finding that Employer failed to disprove the Miner had legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

**Legal Pneumoconiosis**

To prove the Miner did not have legal pneumoconiosis, Employer must demonstrate that he did not have a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8.

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725.305, 725.309, 725.310; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

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

[7] "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). "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).

Employer relies on the opinions of Drs. Tuteur, Caffrey, and Fino who opined the Miner had lung cancer and chronic obstructive pulmonary disease (COPD)/emphysema caused solely by cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 4, 6, 7, 9, 10. The administrative law judge found their opinions not well reasoned. Decision and Order at 19-20.

Employer initially contends the administrative law judge did not adequately explain his finding the Miner had a 30.375 pack-year smoking history when "[t]he record contains evidence of over a 50 year smoking history." Employer's Brief at 10-11. Employer has not shown how the administrative law judge's alleged error adversely affected his weighing of the medical opinions. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). Although Drs. Tuteur, Caffrey, and Fino based their opinions on longer smoking histories than the administrative law judge found, he did not diminish the weight given to their opinions for this reason. Decision and Order at 13-24; Employer's Exhibits 4, 6, 7, 9, 10. We therefore reject Employer's assertion the case must be remanded for the administrative law judge to reconsider the length of the Miner's smoking history. *See Shinseki*, 556 U.S. at 413.

Employer next contends the administrative law judge did not offer valid explanations for discounting the opinions of Drs. Tuteur, Caffrey, and Fino and that he erroneously conflated the legal standards for rebutting legal pneumoconiosis and disability causation. Employer's Brief at 8, 16. We disagree. Although the administrative law judge's analysis of disability causation subsumed a discussion of legal pneumoconiosis, he rejected the opinions of Employer's experts not because they did not meet a specific legal standard but because he found their opinions inadequately reasoned.

The administrative law judge accurately noted Drs. Tuteur and Caffrey exclude a diagnosis of legal pneumoconiosis based on medical literature pertaining to the relative risks of smoking versus coal mine dust exposure in causing COPD. Decision and Order at 19. Contrary to Employer's contention, the administrative law judge permissibly found their "reliance on the medical literature is problematic as neither physician adequately explains how the medical literature specifically relates to the Miner." Decision and Order at 19; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Dr. Tuteur explained that "smokers who [have] never mined" have a twenty percent risk of developing COPD compared to a one to two percent risk "of non[-]smoking miners" developing the disease. Employer's Exhibit at 6 at 8. He therefore opined that the Miner's clinical picture of disabling COPD was "uniquely due to the chronic inhalation of tobacco

smoke, not coal mine dust." *Id*. As the administrative law judge noted, however, Dr. Tuteur acknowledged that the Miner was exposed to sufficient amounts of coal mine dust to put him at risk of developing COPD. Decision and Order at 9; Employer's Exhibit 6. He therefore permissibly found Dr. Tuteur failed to adequately explain why the Miner was not one of the allegedly small percentage of miner's that develop COPD. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 19.

Similarly, Dr. Caffrey noted that cigarette smoking is the most common cause of COPD and reasoned that the Miner was at a higher risk for developing COPD due to his extensive smoking history. Employer's Exhibit 4 at 4. The administrative law judge permissibly rejected Dr. Caffrey's opinion because it does not take into account the Department of Labor's position that the effects of smoking and coal mine dust exposure may be additive. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Stallard*, 876 F.3d at 671-72; Decision and Order at 20. Thus, we affirm the administrative law judge's determination that neither Dr. Tuteur nor Dr. Caffrey adequately explained why they excluded the Miner's seventeen years of coal mine dust exposure as a contributing or aggravating factor in his COPD. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995); Decision and Order at 19-20.

The administrative law judge also acted within his discretion in rejecting Dr. Fino's opinion. *See Hicks*, 138 F.3d at 533. Dr. Fino prepared a May 31, 2001 report, based on his examination of the Miner in a prior claim. Employer's Exhibit 7. He also authored a November 1, 2016 report, based on his review of the medical record, and was deposed on November 14, 2016. Employer's Exhibits 9, 10. In his 2001 report, Dr. Fino opined that because the Miner's obstruction was found in the small airways, it was not related to coal mine dust exposure. Employer's Exhibit 9. The administrative law judge permissibly found "this explanation slightly deficient as Dr. Fino does not provide support for this assertion, nor does he indicate that it is never possible for coal-dust related obstruction to first appear in this way." Decision and Order at 19; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Hicks*, 138 F.3d at 533. He also permissibly found Dr. Fino's opinion unpersuasive because his "original report was written over [fifteen] years ago and therefore less relevant, as the Miner's condition and factors affecting that condition has significantly changed." Decision and Order at 19; *see Hicks*, 138 F.3d at 533.

Additionally, the administrative law judge accurately noted Dr. Fino stated in his more recent 2016 report that the Miner "may have had a coal mine dust related pulmonary condition" prior to his lobectomy. Decision and Order at 20, *quoting* Employer's Exhibit 7. The administrative law judge also accurately noted, however, that Dr. Fino did not

specifically address the etiology of the Miner's COPD in his 2016 report or deposition testimony. Decision and Order at 20; Employer's Exhibits 7, 10. Because the administrative law judge was unable to discern if Dr. Fino's opinion had changed regarding whether the Miner had legal pneumoconiosis, we see no error in his rejection of it. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 20.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge acted within his discretion in finding the opinions of Drs. Tuteur, Caffrey, and Fino not well-reasoned and his credibility determinations are supported by substantial evidence, we affirm his finding that Employer did not disprove legal pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Compton*, 211 F.3d at 211; *Hicks*, 138 F.3d at 533.

**Disability Causation**

The administrative law judge also found Drs. Tuteur's, Caffrey's, and Fino's opinions inadequately reasoned to prove that "no part of [the Miner's] total disability was caused by legal pneumoconiosis." Decision and Order at 23. Employer generally contends the administrative law judge erred because the Miner did not have legal pneumoconiosis and his respiratory disability from cancer was due to smoking. Employer's Brief at 6-22. Because we have affirmed the administrative law judge's finding that the Miner's COPD constitutes legal pneumoconiosis, we reject Employer's contention. Thus we affirm his determination that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of the Miner's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22. We therefore affirm the administrative law judge's finding that Claimant established entitlement to benefits in the Miner's claim.[9] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.310.

[8] Because we affirm the administrative law judge's discrediting of Drs. Tuteur's, Caffrey's, and Fino's opinions, we need not address Employer's contention that the administrative law judge erred in crediting Dr. Perper's opinion on legal pneumoconiosis. S*ee Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] We affirm, as unchallenged, the administrative law judge's finding that granting modification renders justice under the Act. *Skrack*, 6 BLR at1-711; Decision and Order at 23-25.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge