**U.S. Department of Labor**

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

BRB Nos. 20-0534 BLA
and 20-0535 BLA

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| SANDRA STEELE<br>(o/b/o and Widow of BILLY W. STEELE)<br><br>Claimant-Respondent<br><br>v.<br><br>CONSOLIDATION COAL COMPANY<br><br>and<br><br>Self-insured through<br>SMARTCASUALTYCLAIMS, TPA<br><br>Employer/Carrier-<br>Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS'<br>COMPENSATION PROGRAMS, UNITED<br>STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 09/16/2021<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer[1] and its Carrier (Employer) appeal ALJ Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-05659, 2017-BLA-05850) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on January 28, 2015,[2] and a survivor's claim filed on May 24, 2017.[3]

The ALJ credited the Miner with 14.13 years of coal mine employment and therefore found Claimant could not invoke the rebuttable 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 whether Claimant established entitlement to benefits without the benefit of the presumption, he found the Miner had clinical and legal pneumoconiosis,[5] and Claimant

[1] The district director designated Bishop Coal Company (Bishop) as the responsible operator in this case. Miner's Claim (MC) Director's Exhibit 97. Administrative Law Judge (ALJ) Theodore W. Annos also identified Bishop as the responsible operator, and indicated on the caption for his Decision and Order that Bishop is the employer. However, Employer has identified itself as Consolidation Coal Company in its Notice of Appeal, Petition for Review, and Brief in Support of Petition for Review. Notwithstanding this inconsistency, Employer does not dispute the ALJ's finding that it is the responsible operator liable for the payment of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-4.

[2] The Miner filed one prior claim. MC Director's Exhibit 1. The district director denied it on November 2, 2012 because the Miner failed to establish the existence of pneumoconiosis. *Id.* at 327. The Miner took no further action on his denied claim.

[3] The Miner died on January 29, 2017, while his claim was pending. Survivor's Claim (SC) Director's Exhibit 4. Claimant, the Miner's widow, is pursuing his claim on his behalf as well as her own survivor's claim. The Board consolidated Employer's appeals in the miner's and survivor's claims for purposes of decision only.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis where the evidence establishes 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] "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

therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 725.309(c).[6] The ALJ further found the Miner's pneumoconiosis arose out of his coal mine employment, and he was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.203, 718.204(b)(2), (c). Consequently, he awarded benefits in the miner's claim. In the survivor's claim, the ALJ found Claimant automatically entitled to benefits under Section 422(*l*) of the Act.[7] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ erred in finding Claimant established clinical pneumoconiosis, legal pneumoconiosis, and disability causation.[8] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review 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

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tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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 significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] Where 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 failed to establish pneumoconiosis in his prior claim, Claimant had to establish this element in order to obtain review of the merits of the subsequent claim. *See White*, 23 BLR at 1-3; MC Director's Exhibit 1.

[7] Section 422(*l*) of the Act provides that the survivor of a miner determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[8] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24-25.

accordance with applicable law.[9] 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).

**Miner's Claim**

Without the benefit of the statutory presumptions, 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 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). The ALJ considered the opinions of Drs. Rothfleisch, Forehand, Fino, Sargent, and Jawad. Decision and Order at 19-23. Drs. Rothfleisch, Forehand, and Jawad opined the Miner had legal pneumoconiosis in the form of a disabling obstructive respiratory impairment caused by coal mine dust exposure and cigarette smoking. Miner's Claim (MC) Director's Exhibits 1 at 423, 515; 42; 47; 86. Drs. Fino and Sargent also opined the Miner had a disabling obstructive respiratory impairment, but concluded it was caused by cigarette smoking alone and was unrelated to coal mine dust exposure. MC Director's Exhibit 1 at 471; MC Employer's Exhibits 1, 2 at 30.

The ALJ discredited the opinions of Drs. Jawad, Fino, and Sargent as not well-reasoned.[10] Decision and Order at 21-23. He found Dr. Rothfleisch's opinion well-reasoned, documented, and entitled to the greatest weight. *Id*. at 23. He found Dr. Forehand's opinion credible on the issue of legal pneumoconiosis, but assigned it less

[9] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; MC Director's Exhibits 1 at 515; 31; 42; 84.

[10] We affirm as unchallenged the ALJ's findings discrediting the opinions of Drs. Fino and Sargent on the issue of legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 21-23.

weight than Dr. Rothfleisch's opinion because Dr. Forehand relied an inflated coal mine employment history. *Id*.

Employer argues the ALJ erred in crediting Dr. Rothfleisch's opinion, contending the doctor retracted his opinion that the Miner had legal pneumoconiosis by conceding in his deposition that cigarette smoking could have caused all of the Miner's obstructive impairment. Employer's Brief at 5-10. It asserts the ALJ erred by failing to discuss this evidence. We disagree.

In his initial report, Dr. Rothfleisch opined the Miner's pulmonary function testing demonstrated a moderate, non-reversible obstructive respiratory impairment. Director's Exhibit 42. He noted the Miner had fourteen and one-half years of "heavy coal [mine] dust exposure;" symptoms of "daily cough, sputum production, [and] wheezing;" and "severe dyspnea with any exertion." *Id*. He diagnosed "[c]hronic obstructive bronchitis based upon daily cough and sputum production, as well as pulmonary function testing showing moderate fixed obstruction." *Id*. He determined the impairment was due to both coal mine dust exposure and cigarette smoking, explaining "it is not possible to state the relative contribution of each," but "with [fourteen and one-half] years of heavy coal dust exposure," coal mine dust was "certainly at least a significant aggravating factor." *Id*.

In his subsequent deposition, Dr. Rothfleisch did not, as Employer alleges, retract his diagnosis of legal pneumoconiosis or opine the Miner's obstructive impairment was due entirely to cigarette smoking. Employer's Brief at 5-10. Employer's counsel asked him to assume the Miner had no coal mine dust exposure and then address if thirty-three years of cigarette smoking exposure could have caused the Miner's obstructive respiratory impairment by itself. MC Director's Exhibit 86 at 9. He agreed that, in the absence of coal mine dust exposure, this history of cigarette smoking could explain the Miner's degree of impairment. *Id*. Dr. Rothfleisch reiterated, however, the Miner had sufficient coal mine dust exposure to have caused his impairment had he never smoked, and thus his obstructive impairment was due, at least in part, to his coal mine dust exposure.[11] *Id.* at 12.

[11] The Fourth Circuit has held that a miner can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (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."). Thus there is no merit to Employer's argument that Dr. Rothfleisch's opinion cannot establish legal

Because Dr. Rothfleisch's deposition testimony is consistent with his written opinion that the Miner's disabling obstructive impairment was significantly related to, or substantially aggravated by, coal mine dust exposure, we reject Employer's argument that the doctor rendered a conflicting opinion in his deposition.[12] *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006). The ALJ also permissibly found Dr. Rothfleisch's opinion well-reasoned and documented because it is "supported by the objective medical evidence" and the doctor "adequately explained his finding that coal dust exposure was at least a significant aggravating factor" in the obstructive impairment. Decision and Order at 20; *see 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).

Employer next argues Dr. Forehand also retracted his legal pneumoconiosis opinion in his deposition. Employer's Brief at 10-12. We disagree.

In his initial opinion, Dr. Forehand stated the Miner smoked cigarettes for thirty-eight years and acknowledged his smoking had significantly contributed to his obstructive ventilatory impairment and shortness of breath. MC Director's Exhibit 1 at 518. He also opined, however, that the Miner's obstructive impairment "arose as the result of exposure to occupational coal mine dust," that coal mine dust was a significantly and substantially contributing cause, and "each alone [coal mine dust and smoking] would significantly contribute to a totally and permanently disabling respiratory impairment." *Id.* In his deposition, he reiterated that the Miner's FEV1 on pulmonary function testing was reduced "in large part because he is a smoker." MC Director's Exhibit 1 at 445, 455. However, he did not exclude coal mine dust exposure as a contributing cause. He stated he could not "apportion a degree or an extent that each [exposure] has caused at this point because of the amount of disease [and] the amount of lung function [the Miner has] lost." *Id.*

Contrary to Employer's contention, Dr. Forehand did not retract his diagnosis of legal pneumoconiosis by stating he could not apportion the extent to which cigarette smoking or coal mine dust exposure caused the Miner's obstructive impairment. Employer's Brief at 10. Because coal dust need not be the sole cause of the Miner's respiratory or pulmonary impairment, a claimant can prove legal pneumoconiosis based on

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pneumoconiosis because he stated the Miner's obstructive impairment was due, at least in part, to his coal mine dust exposure. Employer's Brief at 14.

[12] Contrary to Employer's argument, Dr. Rothfleisch was not required to apportion a specific percentage of the Miner's impairment to cigarette smoke as opposed to coal mine dust exposure in order to establish the existence of legal pneumoconiosis. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000); Employer's Brief at 10.

a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them. *See Consol. Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000); 20 C.F.R. §718.201(a)(2), (b). The ALJ also permissibly found Dr. Forehand's opinion credible because it is "consistent with the objective medical evidence, both during his exam and in the treatment records, and Miner's medical history, particularly his treatment for COPD, cough, shortness of breath, and wheezing."[13] Decision and Order at 19; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Employer generally argues that the opinions of Drs. Rothfleisch and Forehand are not well-reasoned or documented. Employer's Brief at 9-12. We consider Employer's remaining arguments to be a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because it is supported by substantial evidence, we affirm the ALJ's determination that the medical opinion evidence establishes the existence of legal pneumoconiosis, 20 C.F.R. §718.202(a)(4), and that the evidence of record, when weighed together, establishes the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 23. We also affirm his finding Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 23.

Finally, Employer argues the ALJ erred in finding the Miner's total disability was due to pneumoconiosis based on the opinions of Drs. Rothfleisch and Forehand.[14] Employer's Brief at 9-12. We disagree. 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 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

[13] The ALJ acknowledged Dr. Forehand relied on a coal mine employment history of twenty years which is greater than the 14.13 years he found. Decision and Order at 19. Contrary to Employer's argument, he permissibly found the doctor's opinion still credible and entitled to some weight, notwithstanding the reliance on an inflated work history. *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); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (the effect of an inaccurate exposure history on the credibility of a medical opinion is a determination for the ALJ to make).

[14] As it is unchallenged, we affirm the ALJ's discrediting of the opinions of Drs. Fino and Sargent on the issue of disability causation. *See Skrack*, 6 BLR at 1-711; Decision and Order at 28-29.

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).

All the doctors who rendered a medical opinion in this case agree the Miner was totally disabled by an obstructive respiratory impairment, but disagree on whether the impairment was significantly related to, or substantially aggravated by, coal mine dust exposure and thus constitutes legal pneumoconiosis. MC Director's Exhibit 1 at 471; MC Employer's Exhibits 1, 2 at 30. As discussed above, the ALJ permissibly relied on Dr. Rothfleisch's opinion, and gave Dr. Forehand's opinion some weight, in finding this disabling impairment constitutes legal pneumoconiosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 19-21, 23. We therefore see no error in his finding Claimant established that legal pneumoconiosis was a substantially contributing cause of the Miner's 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 at 29.

As substantial evidence supports the ALJ's finding the opinions of Drs. Rothfleisch and Forehand establish that legal pneumoconiosis substantially contributed to the Miner's disability, we affirm his finding of disability causation pursuant to 20 C.F.R. §718.204(c).[15] We therefore affirm the award of benefits in the miner's claim.

**Survivor's Claim**

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[15] Because we affirm the ALJ's finding that the Miner was totally disabled due to legal pneumoconiosis, we need not address Employer's argument he erred in weighing the evidence on clinical pneumoconiosis. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4-5.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge