U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0067 BLA

BILLY RAMEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN ELKHORN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 12/14/2017
OLD REPUBLIC INSURANCE 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 of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C. for employer/carrier.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05384) of Administrative Law Judge Dana Rosen 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 April 19, 2012.[1]

The administrative law judge initially found that the claim was timely filed, and credited claimant with ten and one-half years of underground coal mine employment. Because claimant had fewer than fifteen years of coal mine employment, the administrative law judge found that he did 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) (2012).[2] The administrative law judge further found, however, that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, and therefore established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also found that claimant established that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203, that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R.

[1] Claimant's prior claim, filed on December 30, 2008, was denied by the district director on December 7, 2009 for failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1 at 131, 141. Claimant's request for modification was denied by the district director on February 25, 2011 for failure to establish the existence of pneumoconiosis. Director's Exhibit 1 at 9. Claimant did not further pursue his prior claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in underground mines, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R §718.305.

§718.204(b), and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that this subsequent claim was timely filed. Alternatively, employer asserts that the administrative law judge erred in her evaluation of the medical opinions in finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also asserts that the administrative law judge failed to adequately address whether claimant's totally disabling impairment is due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits.[3] The Director, Office of Workers' Compensation Programs, filed a limited response.[4] Employer filed a reply brief reiterating its contentions.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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

[3] Alternatively, claimant asserts that if the award of benefits is vacated and the case is remanded, the administrative law judge should be directed to reconsider his finding that claimant's work as a *private* mine safety inspector, from 1978 until 1979, did not qualify as coal mine employment. Claimant's Response at 20-21, *referencing* Decision and Order at 8-9.

[4] The Director, Office of Workers' Compensation Programs (the Director), responds to employer's argument that Dr. Forehand's opinion is not credible because he did not specify whether claimant's respiratory impairment arose out of his covered coal mine employment, as opposed to his non-covered employment as a federal coal mine inspector. The Director asserts that if the Board agrees with employer's argument, Dr. Forehand will not have provided an opinion on whether claimant has legal pneumoconiosis and, therefore, will not have provided a complete pulmonary evaluation. The Director requests, in that case, that the Board remand the case to the district director to allow Dr. Forehand to clarify his opinion. Director's Response at 1 n.1.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 31-32.

[6] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States

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

Timeliness of Claim

Employer contends that the administrative law judge erred in finding that claimant's subsequent claim was timely filed. Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation, 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis that has been communicated to the miner. The regulation at 20 C.F.R. §725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). The "burden falls on the employer to prove that the claim was filed outside the limitations period." *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013).

Employer contends that because claimant testified at the April 21, 2016 hearing that he was first diagnosed as being totally disabled due to pneumoconiosis in 1994, his claim filed on April 19, 2012 is untimely. Employer's Brief at 10-13; Hearing Transcript at 49. We disagree. The Board has construed Section 422(f) as providing an affirmative statute of limitations defense that must be raised at the earliest possible time and fully pursued before a party may seek judicial review. *Cabral v. Eastern Assoc. Coal. Co.*, 18 BLR 1-25, 1-32 (1993). Here, the administrative law judge acknowledged that employer's counsel raised the issue of the timeliness of the claim at the hearing, but correctly noted that employer did not argue the issue in its post-hearing brief.[7] Decision

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Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[7] The hearing transcript contains the following exchange:

> Administrative Law Judge Rosen (Judge): You are adding the issue of whether the claim was timely filed.
>
> Counsel for employer (Counsel): Yes.
>
> Judge: And what is your reason for believing that the claim was not timely filed?

and Order at 2 n.1; Hearing Transcript at 8-9. Rather, in its post-hearing brief employer waived its affirmative defense stating that "[t]imeliness is now withdrawn as a contested issue." Employer's Post-Hearing Brief at 2; *see Cabral*, 18 BLR at 1-33 (where employer raised timeliness in its controversion of the claim, but withdrew the issue at the hearing, the Board held that the defense was waived). As employer explicitly withdrew the issue of timeliness in its post-hearing brief, we decline to address employer's allegations of error on appeal and we affirm the administrative law judge's finding that claimant's subsequent claim was timely filed. *See* 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); Decision and Order at 2 n.1.

Merits of Entitlement

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, and that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

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> Counsel: Well, it's one of those issues that we ordinarily will not agree to.
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> Judge: Do you have evidence that it was not timely filed?
>
> Counsel: I believe there is some medical report evidence in the file indicating a diagnosis more than three years before he last filed his claim. Whether or not you find that convincing or not, I don't know.
>
> Judge: Thank you very much.
>
> Counsel: But that's why it's indicated as an issue today. And I will tell your Honor if I get in there and get into the details of writing the brief, if I think it's not an issue worthy of your time, then I will withdraw it in my brief, and I will do so explicitly.
>
> Judge: I would appreciate that. Thank you very much.

April 21, 2016 Hearing Transcript at 8-9.

one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[8] The administrative law judge considered the new medical opinions of Drs. Forehand, Rosenberg, and Jarboe. Decision and Order at 25-29; Director's Exhibits 12, 14; Employer's Exhibit 2. Dr. Forehand diagnosed legal pneumoconiosis, opining that claimant suffers from a disabling obstructive impairment with arterial hypoxemia due to both cigarette smoking and coal mine dust exposure. Decision and Order at 25-26; Director's Exhibit 12 at 30. Dr. Rosenberg opined that claimant's disabling obstructive impairment is due to smoking, while Dr. Jarboe opined that it is due to smoking and asthma. Director's Exhibit 14 at 5, 8; Employer's Exhibit 2 at 13. Drs. Rosenberg and Jarboe opined that claimant's coal mine dust exposure did not contribute to his impairment. *Id.* The administrative law judge credited Dr. Forehand's opinion, and discredited the opinions of Drs. Rosenberg and Jarboe. Decision and Order at 29.

Employer argues that the administrative law judge misapplied the preamble in assessing the medical opinion evidence, resulting in a presumption that every former miner who develops obstructive lung disease has legal pneumoconiosis. Employer thus asserts that the administrative law judge incorrectly put the burden on employer to disprove the existence of the disease. Employer's Brief at 13-14, 20-23, 25-26. We disagree.

The administrative law judge permissibly relied on the preamble as a guide in assessing the credibility of the medical opinions in this case. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-492, 25 BLR 2-633, 2-645 (6th Cir. 2014). Contrary to employer's contention, the administrative law judge did not use the preamble as a legal rule or presumption that all obstructive lung disease is pneumoconiosis. Rather, she consulted it as a statement of credible medical research findings accepted by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment, and permissibly evaluated the medical opinions in light of those findings. *See A&E Coal*

[8] The administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis through any of the available methods at 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 25.

Co. v. Adams, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). Moreover, the administrative law judge specifically noted that the burden of proof was on claimant to "prove that he has pneumoconiosis, that it arose out of his coal mine employment, and that the pneumoconiosis has caused him to be totally disabled." Decision and Order at 24. Thus, we reject employer's assertion that the administrative law judge improperly applied a presumption that reversed the burden of proof.

Employer next contends that the administrative law judge erred in relying on the opinion of Dr. Forehand to find that claimant has legal pneumoconiosis. Employer asserts that Dr. Forehand's opinion was based on his view that "every former miner who smokes cigarettes and develops an obstructive lung disease [has] legal pneumoconiosis." Employer's Brief at 14. We disagree. Dr. Forehand specifically testified that he did not believe that coal dust always contributes to chronic obstructive pulmonary disease (COPD) in smoking miners.[9] Director's Exhibit 12 at 85. As the administrative law judge noted, Dr. Forehand also testified that only a minority of smokers and a minority of coal miners develop lung disease, and that "the great majority of smokers don't have a [pulmonary function test] that looks like [claimant's], and a majority of coal miners don't have a [pulmonary function test] that looks like [claimant's]." Director's Exhibit 12 at 86; *see* Decision and Order at 26. Dr. Forehand explained that claimant's work at the face of the mine, where coal is being cut and hard rock is being drilled, made him "more susceptible to the effects of coal dust and coal mine dust, including silica." Director's Exhibit 12 at 86-87; *see* Decision and Order at 26. Further, Dr. Forehand observed that although claimant stopped smoking in the 1990s, his breathing continued to get worse.[10] Decision and Order at 26; Director's Exhibit 12 at 88. For these reasons, the administrative law judge permissibly found that Dr. Forehand persuasively explained why, in claimant's particular case, he determined that coal mine dust exposure is a significant co-contributor, along with cigarette smoking, to claimant's respiratory impairment. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129

[9] At his November 27, 2012 deposition, Dr. Forehand was asked "Is it your philosophy that coal dust always contributes to chronic obstructive pulmonary disease (COPD) in smoking coal miners because you can't rule it out?" Director's Exhibit 12 at 85. Dr. Forehand responded "Well, no. It's not my philosophy." *Id*.

[10] Dr. Forehand stated, "If you stop smoking, things get better. If you stop smoking, the loss of lung function slows down. It might even cease. [Claimant] stopped smoking, but he got worse and this was another factor that I took into consideration." Director's Exhibit 12 at 88.

(6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 25-26; Director's Exhibit 12 at 85-89.

There also is no merit to employer's argument that the administrative law judge "overlooked" Dr. Forehand's reliance on an inaccurate coal mine employment history of twenty-four years, which included claimant's non-covered employment as a coal mine inspector, rather than a coal mine employment history of less than fifteen years. Employer's Brief at 15. The administrative law judge permissibly found that while Dr. Forehand initially considered in his written report a dust exposure history of twenty-four years, at his deposition Dr. Forehand relied on an exposure history of thirteen years. Decision and Order at 25. Specifically, Dr. Forehand stated that claimant's "13 years [of dust exposure] at the face . . . before he was a mine inspector" supported his conclusion that coal dust is a substantially contributing cause of claimant's obstructive impairment. Director's Exhibit 12 at 86-87; *see* Decision and Order at 25. Indeed, Dr. Forehand testified that he did not know how often, or for how long, claimant went into the mines when he worked as a mine inspector, or how much time he spent inspecting surface mines versus underground mines.[11] Director's Exhibit 12 at 66. Therefore, the administrative law judge rejected employer's contention that Dr. Forehand relied on an inaccurate occupational exposure history and permissibly declined to discredit Dr. Forehand's opinion on that basis.[12] *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 25.

[11] Dr. Forehand was asked "[d]o you know when [claimant] was a mine inspector how often he went into the mines?" and he responded "I cannot answer that." Director's Exhibit 12 at 66. Dr. Forehand was additionally asked "[w]hen [claimant] went into the mines as a federal mine inspector, did he tell you how long he would be in those mines?" and he answered "I can't answer that, no, sir." *Id.* Dr. Forehand was further asked "[d]o you know whether or not [claimant] was primarily going to underground or surface mines?" and he responded "[h]e said he was doing both, but I can't give you the breakdown." *Id.*

[12] The administrative law judge also stated that "while [claimant's] duties as a mine inspector may not have met the requirements for the function test, he nevertheless was exposed to [a] significant amount of coal mine dust during this time period." Decision and Order at 25. Employer correctly asserts that claimant's dust exposure as a federal coal mine inspector cannot be relied upon in determining claimant's entitlement to benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012). *See Spatafore v. Consolidation Coal Co.*, 25 BLR 1-181, 1-188 (2016) (holding that non-covered employment cannot be used to establish that a claimant has legal pneumoconiosis); Employer's Brief at 15. However, because the administrative law

Finally, employer asserts that Dr. Forehand's diagnosis of legal pneumoconiosis is not credible because it is based, in part, on a positive x-ray, which is contrary to the administrative law judge's finding that the x-ray evidence does not establish the existence of clinical pneumoconiosis. Employer's Brief at 16. The administrative law judge acknowledged this aspect of Dr. Forehand's opinion and discredited his diagnosis of clinical pneumoconiosis accordingly. Decision and Order at 24-25. The administrative law judge also considered Dr. Forehand's statements that the appearance of claimant's x-rays supported his conclusion that dust exposure contributed claimant's impairment. Decision and Order at 13, 15, 17, *referencing* Director's Exhibit 12 at 30, 76-77, 95. Contrary to employer's contention, however, the administrative law judge was not required to discredit Dr. Forehand's diagnosis of legal pneumoconiosis on that basis. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487, 25 BLR 2-135, 2-149-50 (6th Cir. 2012) (a positive x-ray interpretation need not undercut a diagnosis of legal pneumoconiosis where, although clinical pneumoconiosis was not found to be established, the physician relied on additional relevant factors apart from an x-ray to support his diagnosis of legal pneumoconiosis); Employer's Brief at 16. Here, as the administrative law judge observed, in diagnosing legal pneumoconiosis Dr. Forehand referenced claimant's positive x-ray, but also relied on other factors such as claimant's employment at the face of the mine where he was heavily exposed to coal dust and the failure of claimant's impairment to improve after he ceased smoking. Decision and Order at 25-26; Director's Exhibit 12 at 85-89. Thus, contrary to employer's argument, the administrative law judge permissibly credited Dr. Forehand's diagnosis of legal pneumoconiosis as "well reasoned and supported by the objective medical evidence." Decision and Order at 26; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6.

As substantial evidence supports the administrative law judge's determinations, we affirm her conclusion that Dr. Forehand's opinion is "credible, persuasive," and merits "significant weight." Decision and Order at 26; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek*

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judge provided an alternate valid basis for crediting Dr. Forehand's opinion to find that claimant's impairment arose out of his covered coal mine employment, 20 C.F.R. §718.201(a)(2), (b), we hold that any error in the administrative law judge's additional comments regarding claimant's non-covered employment is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Collieries v. Director, OWCP [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002).

We also reject employer's assertion that the administrative law judge erred in discrediting the opinion of Dr. Rosenberg that claimant does not have legal pneumoconiosis. The administrative law judge correctly noted that in concluding that claimant's disabling impairment is unrelated to coal dust exposure, Dr. Rosenberg relied, in part, on his view that claimant's significantly reduced FEV1/FVC ratio is inconsistent with obstruction due to coal dust exposure. Decision and Order at 27; Director's Exhibit 14 at 6, 8. The administrative law judge permissibly discounted his opinion as inconsistent with the DOL's recognition that obstructive impairments significantly related to or substantially aggravated by coal dust exposure may be associated with decrements in the FEV1 and FEV1/FVC ratio.[13] *See* 20 C.F.R. §718.204(b)(2)(i)(C); 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491, 25 BLR at 2-645; Decision and Order at 27. Accordingly, we affirm the administrative law judge's determination to give "little weight" to Dr. Rosenberg's opinion. Decision and Order at 28. The administrative law judge also permissibly discredited Dr. Jarboe's opinion[14] for the same reason that she discredited Dr. Rosenberg's opinion with respect to the FEV1/FVC ratio.[15] Decision and Order at 28.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512. The Board cannot reweigh the evidence or substitute its inferences for those of the

[13] Additionally, we reject employer's contention that the administrative law judge improperly discredited Dr. Rosenberg's opinion based on his conclusions in other cases. The administrative law judge evaluated Dr. Rosenberg's opinion based on the facts of this case.

[14] Dr. Jarboe opined that "[a] disproportionate reduction of FEV1 compared to FVC is the type of [ ] functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." Employer's Exhibit 2 at 9.

[15] Because the administrative law judge provided valid bases for discrediting the opinions of Dr. Rosenberg and Dr. Jarboe, we need not address employer's remaining arguments regarding the weight she accorded their opinions. *See Kozele*, 6 BLR at 1-382 n.4.

administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's determination to credit the opinion of Dr. Forehand over the opinions of Drs. Rosenberg and Jarboe. *Martin*, 400 F.3d at 306-08, 23 BLR at 2-284-87; Decision and Order at 29. Accordingly, we affirm her determination that claimant has legal pneumoconiosis.[16]

Disability Causation

Employer argues that the administrative law judge failed to adequately address whether the evidence establishes that claimant's totally disabling respiratory or pulmonary impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 26. Employer's contention lacks merit.

Pneumoconiosis is a substantially contributing cause of a miner's total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "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)(i), (ii). It is undisputed that claimant is totally disabled by an obstructive impairment. As we held above, the administrative law judge permissibly relied on Dr. Forehand's opinion to find that claimant established the existence of legal pneumoconiosis, in the form of a disabling obstructive impairment due, in part, to coal mine dust exposure. Contrary to employer's contention, the administrative law judge rationally found that Dr. Forehand's opinion also supported a finding that legal pneumoconiosis is a substantially contributing cause of claimant's total disability, pursuant to 20 C.F.R. §718.204(c). *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599, 25 BLR 2-615, 2-624 (6th Cir. 2014); *Banks*, 690 F.3d at 490, 25 BLR at 2-154-55; Decision and Order at 32. As employer makes no other argument regarding the administrative law judge's finding that claimant's total disability is due to pneumoconiosis, it is affirmed. 20 C.F.R. §718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and

[16] Therefore, we affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309. Decision and Order at 24, 32.

total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), we affirm the administrative law judge's finding that claimant is entitled to benefits.[17]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.[18]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[17] We note that the administrative law judge also considered the evidence submitted in claimant's prior claim and found that it did not alter her determination on any element of entitlement. Decision and Order at 30-32. As this finding is unchallenged, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[18] In light of our affirmance of the award of benefits in this claim, we need not address the issues raised in the Director's or claimant's response briefs. *See* Director's Brief at 1 n.1; Claimant's Response at 20-21.