**U.S. Department of Labor**

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

BRB No. 19-0175 BLA

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| THOMAS M. HOFFMAN | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| KEYSTONE COAL MINING CORPORATION | ) | |
| | ) | |
| | ) | DATE ISSUED: 02/20/2020 |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-BLA-06238) of Administrative Law Judge Drew A. Swank 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 January 10, 2017.[1]

Because the administrative law judge credited claimant with only nine years and four months of coal mine employment,[2] he found claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant could establish entitlement under 20 C.F.R. Part 718, the administrative law judge found the new medical evidence established total disability, and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c). The administrative law judge, however, found the evidence did not establish the existence of legal or clinical pneumoconiosis, 20 C.F.R. §718.202(a), and denied benefits.

On appeal, claimant contends the administrative law judge erred in not crediting him with coal mine employment based on his work for Charles L. Menlo, Incorporated (Menlo) from 1972 to 1977. Claimant also contends the administrative law judge erred in finding the evidence did not establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). Employer responds in support of the denial 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 Denying Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

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[1] Claimant filed a prior claim on August 17, 2006. Director's Exhibit 1. The district director denied the claim on April 12, 2007 because claimant did not establish any element of entitlement. *Id.*

[2] Claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had 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) (2012); *see* 20 C.F.R. §718.305.

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement, but failure to establish any 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).

**Length of Coal Mine Employment**

Claimant contends the administrative law judge erred in not crediting him with coal mine employment with Menlo from 1972 to 1977. The administrative law judge's failure to credit this employment, however, was at worst harmless error. Claimant does not specifically argue that the evidence establishes fifteen years of coal mine employment. Claimant's Brief at 5-6. Rather, he contends that the administrative law judge's finding of nine years and four months of coal mine employment, rather than the "more than 14 years found by the Director" is error. (The Director found 14.54 years of coal mine employment.)

Since claimant does not contest the administrative law judge's finding as to the length of his coal mine employment with employers other than Menlo and argues only that the administrative law judge should have considered his work at Menlo from 1972 through 1977, the combined total of contested and uncontested periods of coal mine employment does not entitle claimant to the benefit of the presumption. It thus is not apparent how any error here would make a difference, and claimant does not provide any explanation. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference").

**Legal Pneumoconiosis**

We also reject claimant's argument that the administrative law judge erred in finding the medical opinions did not establish legal pneumoconiosis.[4] Claimant's Brief at 7-8. To establish legal pneumoconiosis, claimant must demonstrate that he has a chronic

[4] "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 that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Dr. Zlupko diagnosed legal pneumoconiosis in the form of a mild to moderate pulmonary impairment due to coal mine dust exposure. Director's Exhibit 15. Dr. Cohen also diagnosed legal pneumoconiosis, attributing claimant's chronic obstructive pulmonary disease to cigarette smoking and coal mine dust exposure. Claimant's Exhibit 1. The administrative law judge accorded their opinions less weight because he found they relied on inaccurate cigarette smoking histories. Decision and Order at 16.

Claimant does not challenge the administrative law judge's findings that Drs. Zlupko and Cohen relied on inaccurate cigarette smoking histories when diagnosing legal pneumoconiosis.[5] Thus we affirm this credibility finding. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (holding the effect of an inaccurate smoking history on the credibility of a medical opinion is a determination for the administrative law judge to make); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16. Because the administrative law judge permissibly discredited the opinions of Drs. Zlupko and Cohen, the only opinions supportive of a finding of legal pneumoconiosis,[6] we affirm his finding that claimant failed to establish legal pneumoconiosis by a preponderance of the evidence.[7] 20 C.F.R. §718.202(a)(4). Because claimant failed to establish

[5] The administrative law judge noted Drs. Zlupko and Cohen each relied on a five pack-year smoking history, whereas he found a twenty-one pack-year smoking history. Decision and Order at 8, 16.

[6] The administrative law judge also considered Dr. Basheda's opinion that claimant does not have legal pneumoconiosis. Employer's Exhibit 6. The administrative law judge discredited Dr. Basheda's opinion because he found it was not well-reasoned. Decision and Order at 18. The administrative law judge's discrediting of Dr. Basheda's opinion does not assist claimant in satisfying his burden to establish legal pneumoconiosis.

[7] Claimant suggests that because the administrative law judge gave "less weight" to the opinions of Drs. Cohen and Zlupko and discredited the opinion of Dr. Basheda, the evidence supports finding legal pneumoconiosis. Making credibility determinations and weighing the evidence is a matter for the administrative law judge. *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). Although the administrative law judge may have used confusing terminology, it is obvious that in discounting the opinions of Drs. Cohen and Zlupko because they relied on an inaccurate smoking history, and concluding that "none of the medical opinions on legal pneumoconiosis are entitled to any weight," he found their

pneumoconiosis, an essential element of entitlement, we affirm the denial of benefits. 20 C.F.R. §718.202(a); *Trent*, 11 BLR at 1-27.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

opinions insufficient to establish the existence of legal pneumoconiosis. *See Balsavage*, 295 F.3d at 396; Decision and Order at 18.