**U.S. Department of Labor**

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

BRB No. 18-0608 BLA

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| PAUL STOVER | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| DONALDSON MINING COMPANY | ) | DATE ISSUED: 11/26/2019 |
| | ) | |
| 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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-06055) of Administrative Law Judge Natalie A. Appetta, rendered pursuant to the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the "Act"). This case involves a subsequent miner's claim filed on August 14, 2015.[1]

The administrative law judge credited claimant with 10.56 years of underground coal mine employment and therefore found he was unable to 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] Considering whether claimant established entitlement to benefits without benefit of this presumption, the administrative law judge determined claimant established he has pneumoconiosis arising out of coal mine employment and is totally disabled by the disease. 20 C.F.R. §§718.202(a), 718.203(b), 718.204. She therefore found claimant demonstrated a change in an applicable condition of entitlement[3] and awarded benefits.

[1] Claimant's prior claim, filed on August 31, 2009, was denied by Administrative Law Judge Richard A. Morgan in a Decision and Order dated June 11, 2011. Director's Exhibit 1. Judge Morgan determined that although claimant established total respiratory disability, he failed to establish pneumoconiosis. *Id*. Claimant filed a petition for modification on March 7, 2012. *Id*. Administrative Law Judge Drew A. Swank denied the petition in a Decision and Order issued on July 17, 2014, because claimant again failed to establish pneumoconiosis. *Id*. Claimant took no further action until filing the current subsequent claim on August 14, 2015. Director's Exhibit 3.

[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 in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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); *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). Claimant's prior claim was denied because he did not establish pneumoconiosis. Director's Exhibit 1. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing this requisite element. *See* 20 C.F.R. §725.309(c).

On appeal, employer challenges the administrative law judge's findings that claimant established pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[4]

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.[5] 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).

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).[6] 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

**I. Existence of Pneumoconiosis – Legal Pneumoconiosis**

To establish legal pneumoconiosis, claimant must prove 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(a)(2), (b). In considering whether claimant met this burden, the administrative law judge reviewed the medical

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 10.56 years of underground coal mine employment and a totally disabling respiratory or pulmonary 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 4-5, 9-16.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

[6] The administrative law judge determined the irrebuttable presumption of total disability due to pneumoconiosis is not available in this case as there is no evidence that claimant has complicated pneumoconiosis. Decision and Order at 17 n.14, *citing* 20 C.F.R. §718.304.

opinions of Drs. Silman, Rosenberg, and Zaldivar.[7] Decision and Order at 18-23. Dr. Silman diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal dust exposure, with a possible contribution from cigarette smoking. Director's Exhibit 13. Conversely, Dr. Rosenberg opined claimant suffers from pulmonary emphysema attributable solely to cigarette smoking. Employer's Exhibit 4. Similarly, Dr. Zaldivar opined that claimant suffers from "asthma-COPD overlap" due to cigarette smoking. Employer's Exhibit 1.

The administrative law judge gave greatest weight to Dr. Silman's opinion and found it sufficient to establish legal pneumoconiosis, as documented and reasoned. Decision and Order at 20-21. The administrative law judge discredited the opinions of Drs. Rosenberg and Zaldivar as inadequately explained and inconsistent with the medical science the Department of Labor (DOL) relied on in the preamble to the 2001 regulations. *Id.* at 19-20.

Employer initially argues the administrative law judge erred in determining that Dr. Silman provided a reasoned and documented diagnosis of legal pneumoconiosis. Employer maintains that Dr. Silman did not actually diagnose the disease, as he did not indicate claimant's respiratory impairment was significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Employer's Brief at 8-10. Employer further contends Dr. Silman failed to explain why he believed coal dust exposure was a causal factor in claimant's totally disabling obstructive impairment. *Id*. at 10-12. In addition, employer alleges the administrative law judge should have discredited Dr. Silman's opinion because he relied on an inaccurate smoking history. These contentions are without merit. *Id*. at 8-10.

When addressing the cause of claimant's COPD and impairment, Dr. Silman stated: "[Claimant] has a 10-year history of underground coal mine employment with heavy coal dust exposure. [Claimant] has [an] 8-pack-year smoking history, which may be additive to debility from coal dust exposure, but [I] cannot state the relative contribution of each." Director's Exhibit 13. The administrative law judge permissibly interpreted Dr. Silman's comment as a determination that dust exposure in coal mine employment caused claimant's COPD, with smoking being a probable additional causal factor. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); Decision and Order at 20-21. Dr. Silman's

[7] The administrative law judge also found claimant's treatment records reference a history of pneumoconiosis and contain diagnoses of chronic obstructive pulmonary disease and emphysema, but do not address whether coal dust or smoking caused claimant's pulmonary conditions. Decision and Order at 22-23; Claimant's Exhibits 1, 3; Employer's Exhibits 5, 6.

inability to identify the precise percentage of claimant's COPD attributable to coal dust exposure did not render his opinion unreasoned, as "doctors need not make such particularized findings" in the context of legal pneumoconiosis. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006). Rather, a medical opinion can establish legal pneumoconiosis when the physician credibly diagnoses a lung disease or impairment that arose at least in part out of dust exposure in coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309-11 (4th Cir. 2012). The administrative law judge reasonably found Dr. Silman provided a credible diagnosis, as he identified the objective testing, symptoms, observations and other data supporting his conclusion.[8] *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); Decision and Order at 21.

We also reject employer's argument that the administrative law judge violated the Administrative Procedure Act (APA),[9] by failing to explain why Dr. Silman's reliance on an eight pack-year smoking history, considerably shorter than her finding of "at least" fifteen pack-years, did not detract from the credibility of his opinion. Decision and Order at 7. The administrative law judge considered claimant's hearing testimony, the examining physicians' opinions, claimant's treatment records, and prior administrative law judges' decisions. *Id*. at 6-7. After consistently observing that the reports of the length and extent of claimant's cigarette use "vary," the administrative law judge found claimant smoked for "around" thirty years, beginning in the 1980s and quitting in 2015.[10] *Id*. at 6. While

[8] Dr. Silman indicated his conclusions were based on claimant's qualifying pulmonary function test demonstrating a "very severe obstructive defect" with evidence of air-trapping and a diffusion defect, a qualifying arterial blood gas study illustrating "compensated hypercarbia and arterial hypoxemia," and his observations of claimant's "dyspnea on exertion to walking up only 4 stairs" and "some labored breathing after ambulating to [the] clinic." Director's Exhibit 13.

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[10] As the administrative law judge noted, the reports of claimant's smoking history included the following: claimant's hearing testimony that he started smoking in the 1980s or 1990s and continued for twenty years; Dr. Silman's report that claimant smoked from 1997 to 2012; Dr. Zaldivar's initial report that claimant started smoking in his twenties, and his subsequent report noting claimant started smoking while in his forties; treatment records indicating claimant smoked for thirty years; and a prior administrative law judge's finding that claimant smoked for eighteen years. Decision and Order at 6; Hearing

recognizing "[c]laimant's smoking rate could be up to 3 packs per day," she credited "his testimony and the most often reported smoking rate of ½ pack per day." *Id.* at 7. She therefore determined claimant had "at least a [fifteen] pack-year smoking history." *Id.*

The administrative law judge further found, however, that "[b]ecause the reports were so inconsistent throughout the record, I decline to reduce the weight of opining physicians who relied upon higher or lower rates of smoking." *Id.* This determination was within the administrative law judge's discretion as the trier-of-fact and adequately explained. *See Bender*, 782 F.3d at 137; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (if a reviewing court can discern what the administrative law judge did and why she did it, the duty of explanation under the APA is satisfied). We therefore reject employer's assertion that the administrative law judge erred in failing to discredit Dr. Silman's diagnosis of legal pneumoconiosis because he relied on an inaccurate smoking history.

With respect to Drs. Rosenberg and Zaldivar, employer argues the administrative law judge selectively analyzed their opinions and, in doing so, provided invalid reasons for discrediting their shared view that claimant's obstructive lung disease is due solely to smoking. Employer's Brief at 18-27. We disagree.

Dr. Rosenberg opined that when coal mine dust exposure causes obstruction, the general pattern is that of reduced FEV1 results, with a corresponding reduction of FVC results, such that the FEV1/FVC ratio is generally preserved. Employer's Exhibit 4. Because claimant's FEV1/FVC ratio was reduced, Dr. Rosenberg concluded his impairment was consistent with one caused by cigarette smoking rather than coal mine dust exposure. Employer's Exhibit 8 at 24-27. The administrative law judge permissibly discredited this aspect of Dr. Rosenberg's opinion because his reasoning conflicts with the medical science the DOL has accepted, which recognizes that coal mine dust exposure can cause clinically significant obstructive disease shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 19-20.

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Transcript at 24-25; Director's Exhibits 1, 13; Claimant's Exhibit 3; Employer's Exhibits 1, 2, 6. The administrative law judge also accurately summarized claimant's testimony that he smoked one-half pack per day; Dr. Silman's report of one-half pack per day; 1990 treatment records reflecting two to three packs per day; and 2015 treatment records indicating one-quarter pack per day. Decision and Order at 7.

In addition, the administrative law judge rationally determined Dr. Rosenberg's citation to medical literature postdating the revised regulations does not necessarily support his opinion, as "[r]ecent studies showing that cigarette smoking is more detrimental than coal dust do[] not preclude coal dust as a contributor or aggravating factor to [claimant's] lung disease." Decision and Order at 20; *see Bender*, 782 F.3d at 137. Hence, she also permissibly discredited Dr. Rosenberg's opinion because, despite the many factors he cited in support of his conclusion, he did not explain why coal dust exposure did not contribute, along with cigarette smoking, to claimant's obstructive lung disease. 20 C.F.R. §718.201(b); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14; Decision and Order at 20.

Dr. Zaldivar, noting that claimant did not have radiographic evidence of pneumoconiosis, opined "there is very little, if any, dust" within claimant's lungs to cause his pulmonary impairment and instead has "asthma-COPD overlap." Employer's Exhibit 1. Contrary to employer's contention, the administrative law judge permissibly discredited Dr. Zaldivar's opinion because he relied on a premise inconsistent with the regulation providing "[a] claim for benefits must not be denied solely on the basis of a negative chest X-ray."[11] 20 C.F.R. §718.202(b); *see Looney*, 678 F.3d at 313; Decision and Order at 20.

As the trier-of-fact, it is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine the credibility of the evidence. *See Stallard*, 876 F.3d at 670. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the medical opinion evidence establishes legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir. 2000); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). We further affirm, as supported by substantial evidence, her determination that all of the evidence of

[11] We reject employer's allegation the administrative law judge's finding is in error because she did not consider the numerous other reasons Dr. Zaldivar provided for ruling out coal dust as a cause of claimant's lung disease and impairments. Employer's Brief at 21. It was not unreasonable for the administrative law judge to treat the invalid rationale Dr. Zaldivar provided as detracting from the credibility of his entire opinion. *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).

record, when weighed together, establishes legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[12] *See Compton*, 211 F.3d at 209; Decision and Order at 23.

**II. Total Disability Due to Pneumoconiosis**

The regulation at 20 C.F.R. §718.204(c)(1) provides:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 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); 65 Fed. Reg. at 79,946-47 (The "substantially contributing cause" standard was not intended to alter the meaning of "totally disabled due to pneumoconiosis" as previously determined in decisions by the various United States Courts of Appeals under Part 718, but rather was intended to codify the courts' decisions); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990) (claimant must prove by a preponderance of the evidence that pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment).

The administrative law judge determined Dr. Silman's opinion established total disability causation, while she discredited the contrary opinions of Drs. Rosenberg and Zaldivar because they failed to diagnose legal pneumoconiosis. Decision and Order at 24-25. Employer argues the administrative law judge's finding must be vacated, as she relied on an erroneous determination that claimant established legal pneumoconiosis. This contention has no merit.

[12] Because we have affirmed the administrative law judge's determination that claimant established legal pneumoconiosis, we need not address employer's argument that she erred in finding that claimant established clinical pneumoconiosis as any potential error would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Based on the administrative law judge's permissible finding that Dr. Silman's opinion established that claimant's totally disabling COPD constitutes legal pneumoconiosis, she rationally determined his opinion also establishes that pneumoconiosis is a substantially contributing cause of claimant's totally disabling impairment. 20 C.F.R. §718.204(c); *see Robinson*, 914 F.2d at 37-38; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order at 24-25. In addition, the administrative law judge rationally discounted the opinions of Drs. Rosenberg and Zaldivar on the issue of disability causation because, contrary to her finding, neither physician diagnosed legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 25. We therefore affirm the administrative law judge's finding that claimant established disability causation at 20 C.F.R. §718.204(c). Having affirmed the administrative law judge's determination that claimant established all of the requisite elements of entitlement, we further affirm the award of benefits.

Accordingly, the administrative law judge'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