



BRB Nos. 18-0473 BLA
and 18-0474 BLA

MARGARET ANNE CLAY)
(o/b/o and Widow of WAYNE A. CLAY))

Claimant-Respondent)

v.)

ARMCO, INCORPORATED/)
AK STEEL CORPORATION)

DATE ISSUED: 10/22/2019

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 on Remand in Living Miner and Survivor's Claims of Theresa C. Timlin, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand in Living Miner and Survivor's Claims (2012-BLA-06166 and 2015-BLA-05572) of Administrative Law Judge Theresa C. Timlin rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on December 21, 2011, and a survivor's claim filed on January 6, 2015. Both are before the Board for the second time.¹

In her initial decision in the miner's claim, Judge Timlin credited the miner with 12.23 years of coal mine employment,² and found the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)³ and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).⁴ She further found the evidence established total disability due to pneumoconiosis and therefore awarded benefits.

¹ Claimant is the widow of the miner, who died on October 1, 2014. The miner filed four previous claims for benefits. Director's Exhibits 1-4. The district director denied the most recent prior claim, filed on July 16, 2009, due to abandonment. Director's Exhibit 4. The miner did not take any further action until he filed the current claim. Director's Exhibit 6. Claimant is pursuing the miner's claim on behalf of his estate, as well as her survivor's claim. Decision and Order on Remand at 2-3.

² The Board previously noted that because the miner had fewer than fifteen years of coal mine employment, 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) (2012); *Clay v. ARMCO, Inc./AK Steel Corp.*, BRB No. 16-0490 BLA, slip op. at 2 n.2 (June 21, 2017) (unpub.).

³ Legal pneumoconiosis is "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).

⁴ Where 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). Because the miner's prior claim was denied by reason of abandonment, the miner is considered to have failed to establish any element of

On appeal, the Board affirmed, as unchallenged, Judge Timlin's findings that the miner established total disability and a change in an applicable condition of entitlement. The Board vacated, however, her determination that the miner established legal pneumoconiosis and disability causation based on the opinions of Drs. Splan and Wooten.⁵ Accordingly, the Board remanded the miner's claim for Judge Timlin to reconsider legal pneumoconiosis and disability causation. *See Clay v. ARMCO, Inc./AK Steel Corp.*, BRB No. 16-0490 BLA (June 21, 2017) (unpub.).

In her initial decision in the survivor's claim, Administrative Law Judge Lystra A. Harris determined, based on the award of benefits in the miner's claim, that claimant is automatically entitled to benefits pursuant to Section 422(l) of the Act.⁶ 30 U.S.C. §932(l) (2012). On appeal, in light of the Board's decision to vacate and remand the award in the miner's claim, the Board vacated the award of derivative benefits in the survivor's claim and remanded the case for further consideration.⁷ *Clay v. ARMCO, Inc./AK Steel Corp.*, BRB No. 16-0656 BLA (Aug. 30, 2017) (unpub.) (Boggs, J., concurring).

On remand, the survivor's claim was reassigned without objection to Judge Timlin (the administrative law judge) to be consolidated with the miner's claim. The administrative law judge again found the evidence sufficient to establish that the miner had totally disabling legal pneumoconiosis and awarded benefits. Decision and Order on Remand at 7-10. Having awarded benefits in the miner's claim, she determined that claimant was derivatively entitled to survivor's benefits. *Id.* at 10-11.

entitlement. 20 C.F.R. §725.409(c). Consequently, to obtain review of the merits of his claim, the miner had to establish one element of entitlement.

⁵ The Board affirmed the administrative law judge's rejection of the opinion of Dr. Habre that the miner had legal pneumoconiosis, as well as the opinions of Drs. Zaldivar and Basheda that the miner did not have the disease. It also affirmed her rejection of their opinions on disability causation. *Clay*, BRB No. 16-0490 BLA, slip op. at 6-9.

⁶ Under Section 422(l) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012).

⁷ The Board declined employer's request to reconsider its holding in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014) that for the purposes of determining eligibility for derivative benefits under Section 422(l), the award in the miner's claim need not be final or effective. *Rothwell*, 25 BLR at 1-146.

On appeal, employer asserts the administrative law judge erred in finding claimant established the existence of legal pneumoconiosis and that the miner's totally disabling respiratory impairment was due to pneumoconiosis. Based on the errors alleged in the miner's claim, employer argues the award of benefits in the survivor's claim should also be vacated. Claimant responds in support of the awards. 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 if it is rational, supported by substantial evidence, and in accordance with applicable law.⁸ 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).

The Miner's Claim

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). 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).

Legal Pneumoconiosis

Employer contends the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis. See 20 C.F.R. §718.202(a)(4); Employer's Brief at 11-20. In order to establish legal pneumoconiosis, claimant must prove the miner had "a 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).

On remand, the administrative law judge considered the opinions of Drs. Splan and Wooten. Decision and Order on Remand at 7-8; Director's Exhibit 14; Claimant's Exhibit 4. Dr. Splan diagnosed legal pneumoconiosis in the form of cor pulmonale, chronic bronchitis and severe chronic obstructive pulmonary disease (COPD) with moderate hypoxemia due to the inhalation of coal dust and tobacco smoke. Director's Exhibit 14. Dr. Wooten similarly diagnosed severe COPD and moderate hypoxemia due to significant

⁸ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

exposure to coal dust and cigarette smoke. Claimant's Exhibit 4. According "the most weight" to Dr. Splan's opinion, the administrative law judge found the medical opinion evidence established the existence of legal pneumoconiosis. Decision and Order on Remand at 8-9.

We reject employer's assertion the administrative law judge erred in crediting Dr. Splan's opinion. Employer's Brief at 11-17. The administrative law judge permissibly found his opinion well-reasoned because it is based on his clinical findings and observations on physical examination, the objective test results illustrating an obstructive impairment and the miner's risk factors for impairment, including accurate cigarette smoking and dust exposure histories.⁹ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 (4th Cir. 1998); *Sterling Smokeless Coal v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); Decision and Order on Remand at 7-8; Director's Exhibit 14. Contrary to employer's argument, the administrative law judge did not substitute her opinion for that of Dr. Splan. Employer's Brief at 11-17. Rather, she permissibly credited his conclusion that both coal mine dust and smoking contributed to the miner's impairment because it is consistent with the preamble to the 2001 revised regulations where the Department of Labor (DOL) accepted scientific studies indicating "that the risks of smoking and coal mine dust exposure are additive." Decision and Order on Remand at 8, *citing* 65 Fed. Reg. 79,920, 79,939-41 (Dec. 20, 2000); see *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16 (4th Cir. 2012) (it is within an administrative law judge's discretion to look to the preamble in assessing the credibility of a physician's opinion).

Further, the administrative law judge properly found that Dr. Splan's attribution of the miner's COPD and chronic bronchitis at least in part to the inhalation of coal mine dust is sufficient to establish legal pneumoconiosis. See *Looney*, 678 F.3d at 309; see also *Arch*

⁹ Dr. Splan examined the miner on February 25, 2012, and recorded a medical history of chronic bronchitis, chronic obstructive pulmonary disease (COPD) and cor pulmonale. Director's Exhibit 14. Dr. Splan acknowledged two environmental factors relevant to the miner's condition. *Id.* He indicated that the miner worked underground throughout his career and "did not wear any form of protection over his upper airways." *Id.* He also noted that the miner started smoking cigarettes in 1954 and quit in 2008, smoking approximately one pack per day. *Id.* As part of the physical examination, Dr. Splan performed a pulmonary function study, blood gas study, chest x-ray and an electrocardiogram. *Id.* Based on his physical examination, claimant's reported histories and the objective testing, Dr. Splan diagnosed totally disabling COPD in the form of chronic bronchitis which he attributed to a mixture of cigarette smoking and coal dust exposure. *Id.*

On The Green, Inc. v. Groves, 761 F.3d 594, 598-99 (6th Cir. 2014); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 725-726 (7th Cir. 2008); Decision and Order on Remand at 8; Employer’s Brief at 16. We therefore affirm the administrative law judge’s determination to accord “the most weight” to Dr. Splan’s opinion. See *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order on Remand at 8.

Based on our affirmance of the administrative law judge’s determination that “Dr. Splan’s opinion is sufficient to establish legal pneumoconiosis” and the absence of any credible contrary evidence, any error by the administrative law judge in according weight to Dr. Wooten’s diagnosis of legal pneumoconiosis is harmless. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer’s Brief at 17-20. We therefore affirm, as supported by substantial evidence, the administrative law judge’s finding that the medical opinion evidence establishes the existence of legal pneumoconiosis. See 20 C.F.R. §718.202(a)(4); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); Decision and Order on Remand at 9.

Total Disability Causation

To establish the miner was totally disabled due to pneumoconiosis, claimant must establish pneumoconiosis was a “substantially contributing cause” of the miner’s totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). As the Board instructed, the administrative law judge reconsidered the opinions of Drs. Splan and Wooten. Decision and Order at 12-15; Decision and Order on Remand at 10; Director’s Exhibit 14; Claimant’s Exhibits 1, 4, 5, 7; Employer’s Exhibits 3, 4. Dr. Splan opined the miner’s total disability was related entirely to his COPD which was due to the inhalation of coal mine dust and tobacco smoke. Director’s Exhibit 14. Dr. Wooten concluded the miner was totally disabled, noting that in addition to his legal pneumoconiosis, the miner had underlying carcinoma of the lung, coronary artery disease and a recent cerebrovascular accident (CVA). Claimant’s Exhibit 4. Dr. Wooten stated “it is impossible to determine the extent of these factors contributing to the miner’s condition, although neither the coronary artery disease nor CVA would contribute to obstructive changes on the pulmonary function study or the x-ray findings.” *Id.*

The administrative law judge found Dr. Splan’s opinion entitled to great weight because it was supported by the miner’s treatment records and consistent with the medical science credited by the Department of Labor in the preamble to the 2001 revised regulations. Decision and Order on Remand at 10. She determined Dr. Wooten’s opinion was entitled to limited weight because she relied on a positive x-ray without reviewing the entirety of the x-ray evidence and overestimated the length of the miner’s coal dust

exposure.¹⁰ *Id.* Relying on Dr. Splan's opinion, the administrative law judge found claimant established disability causation. *Id.*

We reject employer's assertion that Dr. Splan's opinion is insufficient to establish disability causation because he did not explicitly state legal pneumoconiosis was a substantially contributing cause of the miner's disabling impairment. Employer's Brief at 21. As the administrative law judge noted, Dr. Splan attributed the miner's disability entirely to his COPD and diagnosed that COPD as legal pneumoconiosis. Decision and Order on Remand at 10; Director's Exhibit 14. In light of the administrative law judge's determination to credit Dr. Splan's opinion that the miner's COPD constituted legal pneumoconiosis, which we have affirmed, Dr. Splan's opinion is sufficient to establish the miner's disability was due to legal pneumoconiosis. *See* 20 C.F.R. §718.204(c).

We further reject employer's assertion that the administrative law judge erred in finding Dr. Splan's opinion credible. Employer's Brief at 21-26. The administrative law judge noted that in his February 25, 2012 opinion, Dr. Splan diagnosed total disability due to COPD/legal pneumoconiosis based on accurate coal mine employment and smoking histories and reliable objective testing. Decision and Order on Remand at 8, 10. She also noted that a few months later, on September 19, 2012, it was discovered the miner had squamous cell carcinoma of the left lung.¹¹ Decision and Order on Remand at 10; Claimant's Exhibit 5. The administrative law judge credited Dr. Splan's opinion that COPD/legal pneumoconiosis was the cause of the miner's respiratory disability, however, because it is supported by "the treatment notes [which] invoked a disability stemming from [the miner's] coal mining career a full five years before his squamous cell carcinoma diagnosis [and] emphasize[d] the primary role [the] Miner's coal dust exposure played in his disability." Decision and Order on Remand at 10.

Specifically, the administrative law judge relied on Dr. Porterfield's January 2008 notation of "known severe [COPD]" (later found to be legal pneumoconiosis) and the fact he treated the miner for exacerbation of COPD. Employer's Exhibit 3. She also relied on Dr. Pitsenberger's March 2007 identification of "[e]xacerbation of [COPD,]" the use of home oxygen, and a statement that the miner "is disabled from the coal mines." *Id.* The treatment records further show the miner was diagnosed with exacerbated and underlying COPD in 2007, and include a qualifying pulmonary function study demonstrating "severe

¹⁰ Employer does not challenge this finding.

¹¹ Following a September 13, 2012 wedge resection of a nodule in the miner's left upper lung, Dr. Amirghassemi prepared a pathology report on September 19, 2012. Claimant's Exhibit 5. The miner was subsequently treated for non-small cell lung cancer. Claimant's Exhibit 5; Employer's Exhibit 3.

obstructive airway disease” in 2011. Claimant’s Exhibit 5. Finally, a September 2012 operative report diagnosed “left upper lobe squamous cell carcinoma, acute respiratory failure, end stage COPD, and hypoxemia due to COPD.” *Id.* Thus, contrary to employer’s contention, substantial evidence supports the administrative law judge’s conclusion that the treatment records support Dr. Splan’s opinion that COPD/legal pneumoconiosis substantially contributed to the miner’s totally disabling respiratory impairment. *Compton*, 211 F.3d at 207-208; Decision and Order on Remand at 10; Claimant’s Exhibit 5.

Further, the administrative law judge permissibly concluded Dr. Splan’s disability causation opinion is consistent with the preamble’s recognition that coal dust can cause obstructive lung disease and the risk when combined with cigarette smoke is additive. Decision and Order on Remand at 10; *see* 20 C.F.R. §718.201(a)(2) (The definition of legal pneumoconiosis includes “any chronic restrictive *or* obstructive pulmonary disease arising out of coal mine employment.”) (emphasis added); 65 Fed. Reg. 79,920, 79,937-40 (Dec. 20, 2000); *Looney*, 678 F.3d at 311-12. Consequently, as there is no credible contrary evidence, we affirm her finding that claimant established total disability causation. *See* 20 C.F.R. §718.204(c); Decision and Order on Remand at 10.

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 administrative law judge’s determination that claimant is entitled to survivor’s benefits. 30 U.S.C. §932(l); 20 C.F.R. §802.211(b); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 10-11.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand in Living Miner and Survivor's Claims is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge