

U.S. Department of Labor

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



BRB No. 20-0129 BLA

ROBERT M. PRUNTY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CANTERBURY COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC GENERAL INSURANCE)	DATE ISSUED: 03/25/2021
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer/Carrier.

William M. Bush (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals Administrative Law Judge Natalie A. Appetta's Decision and Order Denying Benefits (2018-BLA-05461) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on October 26, 2016.

The administrative law judge credited the Miner with twelve years of underground coal mine employment and thus 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).² Considering entitlement under 20 C.F.R. Part 718,³ the administrative law judge found Claimant established the Miner had clinical and legal pneumoconiosis and was totally disabled from a respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.204(b)(2). She further found, however, that Claimant did not establish the Miner was totally disabled due to pneumoconiosis and denied benefits. 20 C.F.R. §718.204(c).

On appeal, Claimant argues the administrative law judge erred in finding she failed to establish the Miner's total disability was due to legal pneumoconiosis through the opinions of Drs. Celko, Krefft, and Sood. Employer and its Carrier (Employer) respond in

¹ Claimant is the widow of the Miner, who died on June 4, 2017. Director's Exhibit 11. She is pursuing the Miner's claim on his estate's behalf.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability was 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) (2018); *see* 20 C.F.R. §718.305.

³ The administrative law judge found no evidence of complicated pneumoconiosis and thus Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 18 n.12.

support of the denial of benefits. Employer also contends the administrative law judge erred in finding legal pneumoconiosis.

The Director, Office of Workers' Compensation Programs (the Director), also responds, asserting that he takes no position on the administrative law judge's credibility findings. However, he states if the Benefits Review Board affirms the administrative law judge's finding that Dr. Celko's opinion does not establish disability causation because the doctor did not address the issue, then it should remand the case to the district director for a supplemental report from Dr. Celko as the Miner is entitled to a complete pulmonary evaluation. Employer has filed a reply contending the Director waived the complete pulmonary evaluation issue and arguing the Miner received a complete pulmonary evaluation.⁴

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.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).

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).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established the Miner had twelve years of underground coal mine employment and was totally disabled, but she failed to establish complicated pneumoconiosis or total disability due to clinical pneumoconiosis. 20 C.F.R. §§718.204(b)(2), 718.204(c), 718.304; see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 18, 28, 32.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the Miner's coal mine employment occurred in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 7; Hearing Tr. at 33.

Legal Pneumoconiosis

We first reject Employer's contention that the administrative law judge erred in finding legal pneumoconiosis by crediting the medical opinions of Drs. Celko, Sood, and Krefft.⁶ In order to establish legal pneumoconiosis, Claimant must prove that 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).

Drs. Celko, Sood, and Krefft all diagnosed the Miner with chronic obstructive pulmonary disease (COPD) in the form of emphysema and chronic bronchitis. Director's Exhibit 13; Claimant's Exhibits 1, 1a, 3, 3a. They opined a combination of cigarette smoking and coal mine dust exposure caused the COPD and thus the Miner had legal pneumoconiosis. *Id.* Dr. Swedarsky opined the Miner had COPD related to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 5. Dr. Rosenberg opined the Miner had a respiratory impairment caused by worsening congestive heart failure and not related to coal mine dust exposure. Employer's Exhibits 4, 10 at 29-30.

The administrative law judge found Dr. Swedarsky's opinion poorly documented, based on an inflated cigarette smoking history, and inadequately explained. Decision and Order at 25-26. She also found Dr. Rosenberg's opinion inadequately explained and inconsistent with the regulations implementing the Act. *Id.* at 25. We affirm these credibility findings because Employer does not challenge them.⁷ *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge found the opinions of Drs. Celko, Sood, and Krefft reasoned and documented and thus Claimant established legal pneumoconiosis. Decision

⁶ Although not raised in a cross-appeal, Employer's argument on legal pneumoconiosis is properly before the Board because it is supportive of the administrative law judge's decision denying benefits. 20 C.F.R. §802.212(b); *see Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc). Employer also challenges the administrative law judge's finding of clinical pneumoconiosis. Because we affirm the administrative law judge's finding that Claimant failed to establish total disability due to clinical pneumoconiosis, we need not address Employer's argument.

⁷ The administrative law judge also weighed the autopsy reports of Drs. Abraham, Wecht, and Caffrey. Decision and Order at 22-23. She found none of the doctors addressed legal pneumoconiosis and thus their opinions are not probative on the issue. *Id.* Because Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711.

and Order at 24-26; 20 C.F.R. §718.202(a)(4). We reject Employer's argument that the administrative law judge erred in crediting these opinions. Employer's Brief at 4-5, 8-11.

Dr. Celko diagnosed COPD and respiratory insufficiency based on the Miner's pulmonary function studies and resting arterial blood gas studies. Director's Exhibit 13. He observed the Miner had "a mixed severe restrictive-obstructive defect with a severe diffusing capacity abnormality which point[ed] to emphysema." *Id.* He also observed the Miner "complain[ed] of a daily cough with mucous production for the past [ten] years which is diagnostic of chronic bronchitis." *Id.* The administrative law judge found Dr. Celko explained the basis for his attributing the Miner's COPD in the form of emphysema and chronic bronchitis to a combination of coal mine dust exposure and smoking.⁸ Decision and Order at 24. She also noted he addressed the Miner's other medical conditions and explained why they would not have affected the Miner's obstruction or diffusing capacity impairments. *Id.* Contrary to Employer's argument, the administrative law judge permissibly found Dr. Celko's opinion reasoned and documented on the issue of legal pneumoconiosis. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); Decision and Order at 24.

Dr. Sood diagnosed the Miner with COPD with mixed chronic bronchitis and emphysema due to coal mine dust exposure. Claimant's Exhibit 1. He based his diagnosis on the Miner's reported symptoms, exercise intolerance, pulmonary function study and arterial blood gas study results, prior diagnoses in the Miner's treatment records, the Miner's use of bronchodilators and supplemental oxygen, and x-ray and autopsy findings. *Id.* He noted the Miner had a rapid decline in FEV1 on his pulmonary function testing between 2010 and 2017 with no change in the Miner's weight. *Id.* at 6. Thus he opined obesity does not explain the Miner's lung disease, and noted a rapid FEV1 decline is a risk factor for COPD. *Id.* He opined the Miner's coal mine dust exposure was a substantially contributory cause of his COPD based on its "duration (12.9 years); intensity (working underground); and latency (of approximately 3.5 decades between onset of exposure and onset of disease)." *Id.* Contrary to Employer's argument,⁹ the administrative law judge

⁸ We reject Employer's assertion that Dr. Celko did not diagnose legal pneumoconiosis. Employer's Brief at 4-5. Addressing the Miner's emphysema and chronic bronchitis, Dr. Celko opined "[t]hese phenotypes of [chronic obstructive pulmonary disease (COPD)] are significantly related to coal dust exposure and smoking." Director's Exhibit 13.

⁹ There is no merit to Employer's assertion that Dr. Sood failed to consider the Miner's heart condition. Employer's Brief at 8-9. Dr. Sood specifically stated the Miner's pulmonary function study abnormalities are not "explained away" by atherosclerotic

permissibly found Dr. Sood's opinion reasoned and documented. *Kertesz*, 788 F.2d at 163; *Balsavage*, 295 F.3d at 396; Decision and Order at 24-25.

Dr. Krefft also diagnosed COPD with emphysema and chronic bronchitis. Claimant's Exhibit 3. She based her diagnosis on the Miner's "primarily underground coal mine employment history in jobs that included exposure to coal mine dust, silica, and asbestos." *Id.* She also cited his "chronic symptoms of breathlessness and oxygen dependence; and diagnostic testing that includes resting pulmonary function testing with evidence of severe obstructive lung disease as well as diffusion impairment corroborated by arterial blood gas testing significant for hypoxemia (low blood oxygen concentration) at rest." *Id.* She noted the Miner's autopsy slides revealed emphysema, fibrous pleuritic scarring and pleural thickening, which she found to be indicative of significant silica exposure.¹⁰ *Id.* The administrative law judge noted Dr. Krefft "discussed medical literature that supports that coal mine dust exposure . . . contributes to COPD/emphysema in an additive manner to cigarette smoke exposure." Decision and Order at 15. She found the doctor "addressed claimant's severe cardiovascular disease by discussing medical literature that supports that cardiovascular disease and COPD can be [sic] both be present in a patient." *Id.* at 25. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Krefft's diagnosis of legal pneumoconiosis reasoned and documented. *Kertesz*, 788 F.2d at 163; *Balsavage*, 295 F.3d at 396; Decision and Order at 25.

Consequently we do not agree with Employer that the administrative law judge erred in crediting the opinions of Drs. Celko, Sood, and Krefft on legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 26.

Disability Causation

To establish the Miner's total disability was due to pneumoconiosis, Claimant must prove that pneumoconiosis was a "substantially contributing cause" of the 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 condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is

cardiovascular disease. Claimant's Exhibit 1a. The administrative law judge weighed this aspect of Dr. Sood's opinion on the issue of disability causation.

¹⁰ Dr. Krefft explained the emphysema present on the autopsy slides was "consistent with the degree of substantial diffusion impairment, hypoxia, and obstruction noted on multiple lung function tests dating back to 2010." Claimant's Exhibit 3.

caused by a disease or exposure unrelated to coal mine employment.” 20 C.F.R. §718.204(c)(1)(i), (ii).

Drs. Swedarsky and Rosenberg opined the Miner’s total disability was unrelated to legal pneumoconiosis. Employer’s Exhibits 4, 5. The administrative law judge permissibly discounted their opinions because they did not diagnose legal pneumoconiosis. *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 31.

The administrative law judge also weighed the opinions of Drs. Celko, Sood,¹¹ and Krefft¹² with respect to whether the Miner’s legal pneumoconiosis, in the form of COPD with mixed chronic bronchitis and emphysema, substantially contributed to his total disability. Claimant’s Exhibits 1, 1a, 3, 3a. She found Dr. Celko “did not clearly address the cause of Claimant’s total disability” and thus his opinion is not probative on the issue of disability causation. Decision and Order at 30. She also found Dr. Sood’s explanation for addressing the cause of the Miner’s total disability unpersuasive because it was based on general statistics and not adequately based on the Miner’s specific condition. *Id.* at 30-31. Further, she found Dr. Krefft’s opinion not documented because the doctor’s characterization that the Miner had “frequent COPD exacerbations” is not supported by the Miner’s treatment records, as they include only one hospitalization for “COPD exacerbation.” *Id.* at 31.

¹¹ Dr. Sood opined the Miner was totally disabled based on pulmonary function and arterial blood gas testing. Claimant’s Exhibit 1 at 6, 16. He opined the Miner’s COPD and clinical pneumoconiosis were substantially contributing causes of the disability because the Miner “had no other lung diseases,” and his COPD was consistent with the objective test results and the Miner’s self-reported exercise intolerance. *Id.*

¹² Dr. Krefft diagnosed the Miner with a very severe respiratory impairment based on pulmonary function and arterial blood gas testing. Claimant’s Exhibit 3 at 6-7. She explained the Miner was totally disabled because he required continuous supplemental oxygen; his daily symptoms of breathlessness, cough, and wheezing; and his frequent exacerbations of COPD and cor pulmonale. *Id.* She opined his disabling shortness of breath was caused by his “history of decompensated congestive heart failure and COPD exacerbations.” *Id.* Independent of her opinion that COPD was a substantially contributing cause of the Miner’s total disability, Dr. Krefft opined the Miner’s congestive heart failure itself was related to cor pulmonale caused by pulmonary hypertension due to severe chronic lung disease in the form of COPD. *Id.* at 3, 6-7.

Claimant argues the administrative law judge erred in weighing the opinions of Drs. Celko, Sood, and Krefft. Claimant's Brief at 3-6. Claimant specifically asserts the administrative law judge erred in finding Dr. Celko's opinion does not establish disability causation. Claimant's Brief at 3. This argument has no merit. Dr. Celko diagnosed legal pneumoconiosis and opined the Miner was totally disabled from a pulmonary standpoint. Director's Exhibit 13. He concluded the Miner did not have the pulmonary capacity to perform his last coal mine work based on his mixed severe restrictive-obstructive ventilatory impairment, severe reduction in diffusing capacity, and hypoxemia at rest. *Id.* Dr. Celko also noted the Miner's coronary artery disease, which required bypass surgeries and stenting, could have contributed to his "pulmonary dysfunction," and his decompensated congestive heart failure, cardiomegaly, and obesity could have contributed to his restriction.¹³ *Id.* Contrary to Claimant's argument, Dr. Celko did not specifically address whether the Miner's legal pneumoconiosis was a substantially contributing cause of his disability. For this reason, however, we agree with the Director's request to remand the case to the district director in accordance with 20 C.F.R. §725.406.

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994). The purpose of a Department of Labor (DOL)-sponsored evaluation is to "develop the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a). Consistent with that purpose, a complete pulmonary evaluation must include "a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). Importantly, the complete pulmonary evaluation must also "address the relevant conditions of entitlement . . . in a manner which permits resolution of the claim." 20 C.F.R. §725.456(e). If the administrative law judge concludes the complete pulmonary evaluation "fails to address the relevant conditions of entitlement . . . in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing." 20 C.F.R. §725.456(e).

As Dr. Celko did not address whether the Miner's legal pneumoconiosis was a substantially contributing cause of his pulmonary disability, Dr. Celko did not address a

¹³ Dr. Celko further clarified that the Miner's cardiomegaly and obesity would not have contributed to his obstruction, and his obesity would not have contributed to his diffusion impairment. Director's Exhibit 13.

necessary element of entitlement in a manner which would permit resolution of the claim. 20 C.F.R. §718.204(c). We reject Employer's contention that the Director waived whether the Miner received a complete pulmonary evaluation by failing to raise it below. The Director is statutorily mandated to provide a complete pulmonary evaluation upon a miner's request, and the Board has held that the failure to apply a statutory provision constitutes an exception to the waiver rule. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); Employer's Reply Brief at 1-3.

Given the Director's concession that the DOL failed to provide the Miner with the statutorily required complete pulmonary evaluation, we grant the Director's request to remand this case to the district director. 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42 (6th Cir. 2009); *R.G.B. [Blackburn] v. Southern Ohio Coal Co.*, 24 BLR 1-129 (2009) (en banc); Director's Brief at 2. The district director must obtain a "clarifying opinion" from Dr. Celko on remand. Director's Brief at 2.

Because further clarification from Dr. Celko on the issue of disability causation could affect the administrative law judge's analysis of the record, we decline to address Claimant's additional arguments regarding the opinions of Drs. Krefft and Sood. The administrative law judge is instructed that once Dr. Celko addresses disability causation and thus provides a complete pulmonary evaluation, she should reconsider all relevant evidence on total disability due to legal pneumoconiosis on remand. 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge