U.S. Department of Labor

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

BRB No. 20-0548 BLA

BILLY MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREATER WISE, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE	)	DATE ISSUED: 5/24/2022
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2018-BLA-05780) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on January 19, 2016.

The ALJ credited Claimant with 18.34 years of coal mine employment, but found he did not establish at least fifteen of those years took place in underground coal mines or surface coal mines in conditions substantially similar to those in an underground mine. 20 C.F.R. §718.305(b)(1)(i), (2). He therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Considering entitlement under 20 C.F.R. Part 718, he found Claimant established clinical and legal pneumoconiosis, and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202, 718.203, 718.204(b), (c). Thus he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established clinical and legal pneumoconiosis.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., 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

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b).

[3] The Board will apply the law of United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 7; Hearing Tr. at 9-10.

(pneumoconiosis substantially contributed to the disability). 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 if certain conditions are met, but failure to establish any element precludes an award of benefits. *See 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).

Part 718 - Pneumoconiosis

We first address Employer's challenge to the ALJ's finding that Claimant established the existence of clinical pneumoconiosis[4] based on his weighing of the x-ray evidence.[5] Employer's Brief at 7-9.

Clinical Pneumoconiosis

The ALJ considered nine interpretations of four x-rays dated December 9, 2015, February 22, 2016, February 23, 2017, and April 10, 2019. Decision and Order at 8, 15-16. All of the readings were by physicians dually-qualified as Board-certified radiologists and B readers. *Id*. The ALJ gave equal weight to the readings based on the physicians' qualifications. *Id.* at 15. He found the February 22, 2016 x-ray positive for pneumoconiosis, crediting Drs. DePonte's and Miller's positive readings over Dr. Adcock's negative reading.[6] *Id.*; Director's Exhibits 11, 17, 18. He found the readings of the remaining x-rays in equipoise because Dr. DePonte read each one as positive for pneumoconiosis, while Dr. Adcock read each one as negative. Decision and Order at 15; Director's Exhibits 16, 18, 19; Claimant's Exhibits 1, 2; Employer's Exhibit 1.

Employer asserts the ALJ merely counted the number of positive readings as opposed to negative readings in finding the February 22, 2016 x-ray positive and did not rationally explain his determination. Employer's Brief at 7-9. We disagree. Contrary to

[4] Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] The ALJ found there is no biopsy evidence in the record. Decision and Order at 16.

[6] Dr. Gaziano interpreted the February 22, 2016 x-ray for quality only. Director's Exhibit 14.

Employer's argument, the ALJ properly performed both a qualitative and quantitative analysis of the x-ray evidence, taking into consideration the physicians' qualifications and the number of readings of each film. *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016). He permissibly found the February 22, 2016 x-ray positive based on the preponderance of the positive readings by the dually-qualified radiologists. *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 15-16. Because it is supported by substantial evidence, we affirm the ALJ's finding that the x-ray evidence establishes the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1).

Further, we affirm the ALJ's findings that the medical opinion evidence establishes the existence of clinical pneumoconiosis and the overall evidence establishes the existence of clinical pneumoconiosis arising out of coal mine employment, as Employer has not challenged these findings on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.202(a)(4), 718.203(b); Decision and Order at 16-17, 20.

Legal Pneumoconiosis

We next address Employer's challenge to the ALJ's finding that Claimant established the existence of legal pneumoconiosis[7] at 20 C.F.R. §718.202(a)(4). Employer's Brief at 9-13.

To establish legal pneumoconiosis, Claimant must demonstrate 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(b). Further, the United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, has held a miner can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

The ALJ considered the medical opinions of Drs. Ajjarapu, Fino, and McSharry. Decision and Order at 10-13, 16-20. Dr. Ajjarapu diagnosed legal pneumoconiosis in the

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

form of chronic bronchitis due to coal mine dust exposure and tobacco smoking. Director's Exhibits 11, 24. She also opined Claimant has a totally disabling respiratory impairment due, in part, to his work in the coal mines. Director's Exhibit 24. Dr. Fino opined Claimant does not have legal pneumoconiosis, a respiratory impairment, or a respiratory disability. Director's Exhibit 19. Dr. McSharry opined Claimant does not have legal pneumoconiosis based on the airflow limitation shown in the Claimant's spirometry studies; he deemed this limitation unlikely to be the result of coal dust exposure. Director's Exhibit 20. The ALJ found Dr. Ajjarapu's opinion "well-reasoned," while he found Dr. Fino's opinion not well-reasoned or supported and Dr. McSharry's opinion "equivocal." Decision and Order at 16-17. Thus he found Claimant established the existence of legal pneumoconiosis based on Dr. Ajjarapu's opinion. *Id*.

Employer argues the ALJ relied on an inaccurate smoking history in evaluating the credibility of Dr. Ajjarapu's opinion.[8] Employer's Brief at 10. Specifically, it contends the ALJ erred in finding Claimant has only a 20- to 30-pack-year smoking history because he failed to consider treatment records from physicians who reported Claimant had "between a 40 and 45 pack year smoking history, as of 2011 and 2012." *Id*. at 3-6. It also asserts Claimant's hearing testimony establishes "approximately 37 pack-years." *Id*. at 6-7.

Claimant testified at the hearing that he currently smokes "[a]bout a half a pack a day," but previously smoked "[p]robably a pack a day."[9] Hearing Tr. at 17. He denied he ever smoked more than a pack a day. *Id*. He also testified he had been smoking for "[p]robably 30 years;" he began smoking when he was "[a]bout 30," but later conceded "I really don't know when I started to be honest with you." *Id*. at 17-19. Employer's counsel presented Claimant with his documented smoking histories contained in his numerous treatment records and medical opinions that indicated he smoked a pack and a half per day or two packs per day for forty years.[10] *Id*. at 18-20. Claimant denied both that he smoked two packs per day and that he smoked for forty years. *Id*.

[8] In a May 4, 2016 report, Dr. Ajjarapu noted Claimant started smoking in 1996 and currently smokes one and a half packs of cigarettes a day. Director's Exhibit 11.

[9] The ALJ relied on Claimant's testimony from a July 16, 2019 hearing before ALJ Jennifer Whang, who became unavailable to further adjudicate the claim. Decision and Order at 2 n.1.

[10] As Employer asserts, the record contains conflicting medical evidence regarding Claimant's smoking history. Dr. Nida's September 10, 2013 treatment record notes Claimant smoked two packs a day for 40 years; an August 2, 2014 Norton Community

In his Decision and Order, the ALJ found the record supports a finding that Claimant smoked a pack of cigarettes per day "for 20 to 30 years" but "currently" smokes about a half pack of cigarettes per day. Decision and Order at 8. He stated:

> The accounts of the Claimant's smoking history are generally consistent. The Claimant told Dr. Ajjarapu that he had smoked a half pack of cigarettes a day since 1996. (DX 11). He told Dr. Fino that he smoked a pack of cigarettes a day for 20 years, and had cut back to 2 cigarettes a day for the past 5 years. (DX 19). At the hearing, the Claimant stated that he was smoking about a half pack a day, and smoked about a pack a day before that, for probably 30 years. (Tr. 17, 19-20).
>
> I find that it is not possible to determine the length or extent of the Claimant's smoking history with precision, but the record supports a conclusion that he has smoked a pack a day for 20 to 30 years, and has cut back to about a half pack a day currently.

Id.

We agree with Employer that the ALJ erred in failing to address all the evidence in the record relevant to Claimant's cigarette smoking history. Employer's Brief at 4-5. The ALJ indicated he relied on only the smoking histories from Claimant's hearing testimony and Drs. Ajjarapu's and Fino's reports.[11] Decision and Order at 8. While he summarized Claimant's treatment records about his condition, noted a report from Dickenson Community Hospital "reflects that the Claimant smoked a pack and a half a day," and noted reports from Mountain States Health Alliance "reflect that he smoked 2 or more packs of cigarettes a day," he did not explain how he weighed this evidence in reaching his

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Hospital treatment record notes Claimant smoked two packs a day; and July 24, 2012, November 4, 2015, December 16, 2015, February 5, 2016, and June 2, 2016 Wellmont Medical Associates treatment records note Claimant smoked one pack a day for 40 years. Director's Exhibit 19. Similarly, a July 14, 2015 Wellmont Health System treatment record notes Claimant smoked one pack a day for 40 years. Claimant's Exhibit 5. An August 3, 2014 Mountain States Health Alliance treatment record notes Claimant smoked "2 packs or more a day." Director's Exhibit 19; Employer's Exhibit 9. A November 17, 2015 Wellmont Health System treatment record notes Claimant smoked one pack a day for 40 years. Director's Exhibit 19; Claimant's Exhibit 5. Finally, a December 9, 2015 St. Charles Breathing Center treatment record notes Claimant smoked one half pack a day for 40 years. Claimant's Exhibit 6.

[11] In a March 7, 2017 report, Dr. Fino noted Claimant smoked one pack of cigarettes per day for twenty years and now smokes two cigarettes a day. Director's Exhibit 19.

conclusion regarding the length of Claimant's cigarette smoking history. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The record also contains Claimant's other treatment records indicating he had at least a forty pack-year smoking history. Decision and Order at 13-14; Director's Exhibit 19; Claimant's Exhibits 5, 6; Employer's Exhibit 9.

Because the ALJ failed to address this relevant evidence, we must vacate his conclusion about Claimant's smoking history. *See* 30 U.S.C. §923(b) (fact finder must address all relevant evidence)*; Addison*, 831 F.3d at 252-53; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand); Decision and Order at 8. Moreover, because the ALJ's failure to properly address the length of Claimant's cigarette smoking history may have affected his credibility findings on the issues of legal pneumoconiosis and disability due to legal pneumoconiosis, 20 C.F.R. §§718.202(a), 718.204(c), we vacate his findings that Claimant established these elements. Decision and Order at 18-20; *see Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). We thus decline to address, as premature, Employer's arguments pertaining to the weighing of the evidence on legal pneumoconiosis. Employer's Brief at 9-13.

Our concurring colleague takes issue with Dr. Ajjarapu's report. He is correct that Section 413(b) of the Act provides "[e]ach miner who files a claim for benefits under this subchapter 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), 725.406.1; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). However, none of the reasons he gives for taking issue with Dr. Ajjarapu's report supports his position that the doctor's evaluation does not constitute a complete pulmonary evaluation.

Dr. Ajjarapu examined Claimant, completed Form CM-988 (Medical History and Examination for Coal Mine Workers' Pneumoconiosis), and answered questions from the form's numbered sections, including section 6 (Pulmonary Diagnosis), section 7 (Etiology of Pulmonary Diagnosis), section 8 (Disability/Impairment), and subsection 8c (extent diagnoses in section 6 contributes to this impairment) in an attached report. Director's Exhibits 10, 11. She diagnosed clinical pneumoconiosis based on x-ray and coal mine dust exposure and legal pneumoconiosis in the form of chronic bronchitis related to coal mine dust exposure and cigarette smoking. *Id*. She also opined Claimant has a severe pulmonary impairment and does not have the pulmonary capacity to do his previous coal mine work. *Id*. Further, when addressing the extent to which each of her diagnoses (clinical pneumoconiosis and chronic bronchitis related to coal mine dust exposure) contributed to Claimant's disability, Dr. Ajjarapu stated "[b]ased on the overall evaluation, he is totally

and completely disabled, and his pulmonary impairment is due in part to his work in the coal mines." *Id*.

Our colleague points out that Dr. Ajjarapu does not make any specific reference to her diagnoses of clinical pneumoconiosis and legal pneumoconiosis under section 6 in addressing disability causation under subsection 8c. He also states she does not address the extent clinical pneumoconiosis and legal pneumoconiosis each contribute to the Claimant's totally disabling pulmonary impairment and what "percentage or proportion" of his totally disabling pulmonary impairment can be attributed to his clinical pneumoconiosis and legal pneumoconiosis under subsection 8c. Yet he concedes Dr. Ajjarapu diagnosed clinical and legal pneumoconiosis and opined that "[b]ased on the overall evaluation, [Claimant] is totally and completely disabled, and his pulmonary impairment is due in part to his work in the coal mines." Concurrence at 13.

The plain language of her report confirms Dr. Ajjarapu has addressed the relevant conditions of entitlement regarding both total disability due to clinical pneumoconiosis and total disability due to legal pneumoconiosis. A physician is not required to give a specific numerical percentage or proportion when determining the extent a pulmonary diagnosis contributes to a miner's pulmonary or respiratory disability. 20 C.F.R. §718.204(c). Thus, Dr. Ajjarapu has sufficiently addressed the relevant elements of entitlement to constitute a complete pulmonary evaluation. Accordingly, we do not instruct the ALJ on remand to determine whether Dr. Ajjarapu's evaluation meets the Department of Labor's statutory obligation of providing Claimant with a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§725.406, 725.456(e).

Rather, on remand, the ALJ must consider all relevant evidence, resolve conflicts in the evidence, and provide a finding regarding the length of Claimant's cigarette smoking history. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999) ("[T]he 'substantial evidence' standard is tolerant of a wide range of findings on a given record."); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) (the length and extent of a miner's smoking history is a factual determination for the ALJ); *see also Bobick*, 13 BLR at 1-54 (the ALJ has discretion in determining the effect of an inaccurate smoking history on the credibility of a medical opinion).

In evaluating the medical opinions on remand, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). If reached, he should also address whether each physician overestimated or underestimated Claimant's cigarette smoking and coal mine dust exposure histories when weighing their opinions on the issue of legal pneumoconiosis. *Trumbo v. Reading*

Anthracite Co., 17 BLR 1-85, 1-89 (1993); *Sellards*, 17 BLR at 1-80-81; *Bobick*, 13 BLR at 1-54. He must then address whether Claimant established he has legal pneumoconiosis. 20 C.F.R. §718.201(b). If he finds Claimant has legal pneumoconiosis, he must then reconsider whether total disability due to legal pneumoconiosis is established in light of his reconsideration of the evidence relevant to Claimant's smoking history and legal pneumoconiosis.[12] 20 C.F.R. §718.204(c)(1).

Further, as it is unclear that the ALJ addressed the issue of disability causation with respect to clinical pneumoconiosis, he must consider whether Claimant is totally disabled due to clinical pneumoconiosis, 20 C.F.R. §718.204(c)(1), and must adequately explain his findings as the Administrative Procedure Act requires.[13] *Wojtowicz*, 12 BLR at 1-165.

[12] Drs. Fino and McSharry opined Claimant does not have clinical or legal pneumoconiosis, or a disabling respiratory impairment, and thus they opined Claimant is not totally disabled due to pneumoconiosis. Director's Exhibits 19, 20. Dr. Ajjarapu opined Claimant has clinical pneumoconiosis, legal pneumoconiosis, and a totally disabling pulmonary impairment due in part to his work in the coal mines. Director's Exhibits 10, 11.

[13] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Administrative Appeals Judge, concurring:

I concur with my colleagues to affirm the ALJ's findings that the existence of clinical pneumoconiosis arising out of coal mine employment and total disability were established, 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), but to vacate the ALJ's findings that the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis were established, 20 C.F.R. §§718.202(a), 718.204(c). Thus, I also concur with my colleagues to remand the case for the ALJ to reconsider whether Claimant established he has legal pneumoconiosis and, if so, reconsider whether total disability due to legal pneumoconiosis is established. Finally, and just as importantly, because the ALJ did not address another relevant condition of entitlement in this case, whether Claimant is totally disabled due to clinical pneumoconiosis arising out of coal mine employment, I concur with my colleagues to instruct the ALJ that he must consider this separate avenue to establishing entitlement to benefits in this case on remand, 20 C.F.R. §718.204(c)(1).

I write separately, however, to address a question presented in this case as to whether the Department of Labor (DOL) provided Claimant with a complete pulmonary evaluation as required under Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. §923(b).[14] I

[14] Although neither Claimant nor the Director have yet raised, either below or on appeal, the issue of whether the DOL provided Claimant with a complete pulmonary evaluation, the Director's obligation is nevertheless statutorily mandated, and the Board has further held that the failure to apply a statutory provision constitutes an exception to

would further instruct the ALJ that if he finds on remand that Dr. Ajjarapu's evaluation, conducted on behalf of the DOL to provide Claimant with a complete pulmonary evaluation, does not meet the DOL's statutory obligation to provide claimant with a complete pulmonary evaluation, he shall, in his discretion, remand the claim to the district director for further development of the evidence.

Pursuant to Section 413(b) of the Act, "[e]ach miner who files a claim for benefits under this subchapter 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), 725.406.1; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

The purpose of providing a miner with a DOL-sponsored complete pulmonary evaluation is to "develop the medical *evidence necessary to determine* each claimant's *entitlement* to benefits." 20 C.F.R. §718.101(a) (emphasis added). 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). More 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) (emphasis added).[15]

If such pertinent information is lacking, the ALJ "shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional

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the waiver rule. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Thus, the Board has addressed sua sponte whether the DOL provided a claimant with a complete pulmonary evaluation. *See, e.g., Steele v. Addington Inc.*, BRB No. 16-0636 BLA, slip op. at 5-6 (Sep. 21, 2017) (unpub.) (Board remanded the case to the ALJ for further development of the evidence where the physician who conducted the claimant's complete pulmonary evaluation did not address a relevant element of entitlement in a manner that would allow the ALJ to determine whether the claimant established that element). The Board reviews such questions of law de novo. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984).

[15] Apparently as the ALJ found Claimant established entitlement to benefits under 20 C.F.R. Part 718, the Director has not considered whether the DOL has provided Claimant with a complete pulmonary evaluation in this case. However, the Board has now vacated the ALJ's findings that the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis were established and remanded the case for reconsideration of those issues. In addition, because the ALJ did not address whether Claimant is totally disabled due to clinical pneumoconiosis arising out of coal mine employment, the Board

evidence as is required[.]" 20 C.F.R. §725.456(e). The issue is whether the evaluation adequately or sufficiently addresses a relevant condition or element of entitlement, in this case total disability due to clinical pneumoconiosis and total disability due to legal pneumoconiosis, not whether the physician failed to *offer* an opinion on the element. *See, e.g., Greene v. King James Coal Mining, Inc*., 575 F.3d 628, 642 (6th Cir. 2009).[16]

In this case, Dr. Ajjarapu examined Claimant on behalf of the DOL to provide him a complete pulmonary evaluation and submitted a report of her examination. *See* Director's Exhibits 10-11; ALJ Exhibits 4-5 (Evidence Summary Form[s]). She completed Form CM-988, Medical History and Examination for Coal Mine Workers' Pneumoconiosis, by hand, to which she attached a typed report of her answers to the questions presented in the form's numbered sections to set out her evaluation of

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has also instructed the ALJ that he must consider that separate avenue to establishing entitlement on remand.

In response to this appeal, the Director noted he had determined he will not file a substantive response "unless specifically requested to do so by the Board." 20 C.F.R. §§ 802.212(a), 802.215. The Director further noted he does not waive service of all written statements in the case, and he "reserves the right to participate in the future, should he deem it necessary." 20 C.F.R. §§725.360(a)(5), 802.213, 802.216(c). So now, in light of the Board's decision vacating the ALJ's award of benefits, the Director has an opportunity to consider whether the DOL has provided Claimant with a complete pulmonary evaluation in this case.

[16] The Director is not required, however, to provide an evaluation sufficient to meet claimant's burden of proof. S*ee Greene v. King James Coal Mining, Inc*., 575 F.3d 628, 642 (6th Cir. 2009). So long as a physician's evaluation adequately or sufficiently addresses the relevant elements of entitlement, whether the physician's evaluation is sufficient to meet the claimant's burden of proof is immaterial in determining whether a doctor's evaluation constitutes a complete pulmonary evaluation as statutorily required and whether the DOL "fulfilled its obligations under the Act and its implementing regulations." *Greene*, 575 F.3d at 640 (citation omitted); *see, e.g., Hamilton v. Hope Mining Co*., BRB No. 19-0245 BLA (Apr. 15, 2020) (unpub.) (because the doctor examined the claimant, performed all of the required tests and provided an opinion addressing each element of entitlement, the Board rejected Claimant's assertion that the Director did not fulfill her obligation to provide him with a complete pulmonary evaluation and affirmed the ALJ's denial of benefits).

Claimant's: "6. Pulmonary Diagnosis," "7. Etiology of Pulmonary Diagnosis," and "8. Disability/Impairment." Director's Exhibit 11.

Regarding her "pulmonary diagnoses" under section 6 and their "etiology" under section 7, Dr. Ajjarapu diagnosed "chronic bronchitis" related to coal mine dust and tobacco smoke, which she noted constituted "legal" pneumoconiosis, and also diagnosed clinical pneumoconiosis based on x-ray and coal mine dust exposure. Director's Exhibit 11. Next, regarding the "degree of severity of the pulmonary impairment" and whether her evaluation is supported by "diagnostic tests," she indicated Claimant has a "severe pulmonary impairment" based on his pulmonary function testing and "moderate resting hypoxemia" based on his blood gas values. *Id.*

Finally, Form CM-988 subsection 8c. asks "[t]he extent to which each of the diagnoses listed in [section] 6. contributes to this impairment (give your estimate of the percentage or proportion of impairment that can be attributed to each diagnosis [)] (e.g., 50%, substantial, minimal etc.)." In response, Dr. Ajjarapu wrote:

> Based on the overall evaluation, [Claimant] is totally and completely disabled, and his pulmonary impairment is due in part to his work in the coal mines. He is a chronic smoker and he continues to smoke, and he doesn't have the pulmonary capacity to do his previous coal mine employment.

Id.

Thus, Dr. Ajjarapu only indicates Claimant has a totally disabling pulmonary impairment due in part to his coal mine work. But she does not make any reference to her diagnoses under section 6 (namely, both legal pneumoconiosis and clinical pneumoconiosis) and, more relevantly, she does not answer the question that Form CM-988 subsection 8c. asks: to what "extent" did Claimant's clinical pneumoconiosis and legal pneumoconiosis each contribute to his totally disabling pulmonary impairment and what "percentage or proportion" of his totally disabling pulmonary impairment can be attributed to his clinical pneumoconiosis and legal pneumoconiosis.

It therefore is not apparent that Dr. Ajjarapu's evaluation constitutes a complete pulmonary evaluation because it does not, without more, adequately or sufficiently address a relevant and essential condition or element of entitlement, in this case both total disability due to clinical pneumoconiosis and total disability due to legal pneumoconiosis, in a manner that permits resolution of the claim.[17] The relevant question under 20 C.F.R.

[17] Thus, although Dr. Ajjarapu examined Claimant and performed all of the required tests, 20 C.F.R. §725.406(a), she nevertheless did not apparently address "all of the relevant

§718.204(c)(1), that defines total disability due to pneumoconiosis, is whether Claimant's pneumoconiosis as defined in 20 C.F.R. §718.201 (defining both clinical pneumoconiosis and legal pneumoconiosis) is "a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment" (disability causation element), not whether coal dust contributes to his impairment (disease element). *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189 (4th Cir. 1995); *see also Robinson v. Pickands Mather & Co*., 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a "substantially contributing cause" if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Co*., 23 BLR 1-8, 1-17 (2003). Dr. Ajjarapu's evaluation does not address the "extent," "percentage or proportion" that Claimant's clinical pneumoconiosis and legal pneumoconiosis contributes to his totally disabling pulmonary impairment, i.e., whether his clinical pneumoconiosis and, separately, his legal pneumoconiosis has a "material adverse effect" or "[m]aterially worsens" his totally disabling pulmonary impairment.

Consequently, I would instruct the ALJ on remand that if he finds Dr. Ajjarapu's evaluation does not meet the DOL's statutory obligation to provide claimant with a complete pulmonary evaluation, *see* 30 U.S.C. §923(b); 20 C.F.R. §§725.406, 725.426(e), he shall, in his 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 . . . ." 20 C.F.R. §725.456(e). If the ALJ does remand the case for further development of the evidence, the claim should then be adjudicated in light of the new evidence and he should reconsider all relevant evidence on total disability due to clinical pneumoconiosis[18] and total disability due to legal pneumoconiosis on remand. 20 C.F.R. §718.204(c).

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conditions of entitlement . . . in a manner which permits resolution of the claim" for her evaluation to constitute a complete pulmonary evaluation, 20 C.F.R. §725.456(e).

[18] The relevant medical opinion evidence of record in regard to whether Claimant's total disability is due to clinical pneumoconiosis consists of the opinions of Drs. Fino and McSharry, who did not find that Claimant has clinical pneumoconiosis, Director's Exhibits 19, 20, contrary to the ALJ's finding that Claimant has clinical pneumoconiosis arising out of his coal mine employment, which we have affirmed. In her DOL-sponsored evaluation, Dr. Ajjarapu diagnosed clinical pneumoconiosis based on x-ray and coal mine dust exposure, Director's Exhibit 11. Subsequently, Dr. Ajjarapu reviewed additional x-rays submitted into the record, which she noted provided "mixed readings; which ranged from positive to negative readings" and opined that "[e]ven if there is not sufficient evidence for clinical pneumoconiosis, it doesn't rule out the presence of disease." Director's Exhibit

In all other respects, I concur with the holding to vacate the award of benefits and remand this case for further consideration.

DANIEL T. GRESH
Administrative Appeals Judge

24. But again, we have affirmed the ALJ's finding that Claimant has clinical pneumoconiosis arising out of his coal mine employment.