

U.S. Department of Labor

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



BRB No. 23-0113 BLA

WILBERT HOUESHELL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MANOR MINING AND CONTRACTING)	
)	
and)	
)	
OLD REPUBLIC GENERAL INSURANCE)	DATE ISSUED: 05/14/2024
CORP.)	
)	
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 on Remand Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Toni J. Williams and Paul E. Sutter (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

BEFORE: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order on Remand Denying Benefits (2020-BLA-05351) rendered on a claim filed on March 8, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In her March 23, 2021 Decision and Order Denying Benefits, the ALJ credited Claimant with 13.30 years of qualifying coal mine employment and thus found he 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).¹ Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established a totally disabling respiratory or pulmonary impairment but did not establish either clinical or legal pneumoconiosis.² 20 C.F.R. §§718.202, 718.204(b)(2). Consequently, she denied benefits.

Considering Claimant's appeal, the Board affirmed the ALJ's findings that Claimant did not establish complicated pneumoconiosis, invoke the Section 411(c)(4) presumption, or establish clinical pneumoconiosis. *Houdeshell v. Manor Mining & Contracting, Inc.*, BRB No. 21-0360 BLA, slip op. at 2 n.3 (July 29, 2022) (unpub.). However, the Board held the ALJ failed to adequately explain her discrediting of Dr. Pickerill's medical opinion that Claimant suffers from legal pneumoconiosis. *Id.* at 4. Therefore, the Board remanded

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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

² 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). This definition encompasses 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). 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 the 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).

the case for reconsideration of whether Claimant established legal pneumoconiosis and thus entitlement under 20 C.F.R. Part 718. *Id.* at 5; *see* 20 C.F.R. §718.202(a)(4).

On remand, the ALJ found Claimant failed to establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(2). Thus, she denied benefits.

On appeal, Claimant argues the ALJ erred in finding he failed to establish legal pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the 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'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Without the benefit of the Section 411(c)(3) and (c)(4) 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).

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).

Dr. Pickerill conducted the Department of Labor's (DOL's) complete pulmonary evaluation and diagnosed legal pneumoconiosis in the form of moderate to severe chronic obstructive pulmonary disease (COPD) and asthma. Director's Exhibit 20 at 4. The ALJ found Dr. Pickerill's opinion inadequately reasoned and entitled to little weight. Decision and Order on Remand at 6. She therefore found Claimant failed to establish legal pneumoconiosis at 20 C.F.R. §718.204(a)(4).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 2; Director's Exhibit 5; Hearing Transcript at 7-8.

Claimant argues the ALJ erred in finding Dr. Pickerill's opinion inadequately reasoned. Claimant's Brief at 7-9. Specifically, Claimant contends the ALJ did not comply with the Board's remand instructions and failed to sufficiently explain her rationale for discrediting Dr. Pickerill's opinion. *Id.* Claimant's arguments are unpersuasive.

Initially, we disagree with Claimant's assertion that the ALJ did not comply with the Board's instructions on remand. *See Houdeshell*, BRB No. 21-0360 BLA, slip op. at 5; Decision and Order on Remand at 4-6; Claimant's Brief at 7-8. In holding the ALJ erred in discrediting Dr. Pickerill's opinion, the Board noted that, "[o]n its face, Dr. Pickerill's opinion, *if credited*, is legally sufficient to support a finding of legal pneumoconiosis because he specifically diagnosed the disease and identified coal mine dust exposure as a significant contributing factor to Claimant's COPD." *Houdeshell*, BRB No. 21-0360 BLA, slip op. at 4 (emphasis added). Thus, while the Board determined that Dr. Pickerill's opinion meets the definition of legal pneumoconiosis, it instructed the ALJ to reconsider and more fully explain whether Dr. Pickerill's opinion is sufficiently reasoned and credible.⁴ *Id.*; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986).

⁴ Claimant rightfully takes issue with the ALJ's statement that the Board's initial determination that Dr. Pickerill's opinion constitutes a diagnosis of legal pneumoconiosis is "tantamount to inserting the adjudicator's medical opinion for that of Dr. Pickerill[.]" Decision and Order at 6. The ALJ seemingly misunderstood the import of that aspect of the Board's decision. The panel pointed out that because Dr. Pickerill stated Claimant's coal mine dust exposure "substantial[ly] contribut[ed]" to his impairment, the physician's opinion meets the regulatory definition of legal pneumoconiosis. *Houdeshell v. Manor Mining & Contracting, Inc.*, BRB No. 21-0360 BLA, slip op. at 4 (July 29, 2022) (unpub.). Contrary to the ALJ's statement, acknowledging that Dr. Pickerill diagnosed legal pneumoconiosis does not require an adjudicator to insert her opinion for the physician's; it requires comparing the physician's diagnosis to the regulatory definition of the disease. *See* 20 C.F.R. §718.201(a)(2) ("Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 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."). Nor did the Board suggest that the ALJ must credit Dr. Pickerill's opinion on remand. It held that her initial one-sentence, cursory finding regarding the inadequacy of the physician's opinion does not meet the explanatory requirements of the Administrative Procedure Act. *Houdeshell*, BRB No. 21-0360 BLA, slip op. at 4. It thus specifically instructed her to reconsider the *credibility* of his legal pneumoconiosis diagnosis and provide an adequate rationale for her determination. Because the ALJ complied with the Board's remand instructions in that regard, and adequately explained

We further reject Claimant's assertion that the ALJ erred in discrediting Dr. Pickerill's opinion as inadequately reasoned. Claimant's Brief at 8-9. As the ALJ observed, in explaining his diagnoses, Dr. Pickerill wrote only "[o]bstructive lung disease by [pulmonary function study], which improved significantly after bronchodilator, wheezing heart on physical exam, [and] treatment with multiple bronchodilator drugs." Director's Exhibit 20 at 4; Decision and Order at 5. He indicated the etiology of Claimant's diagnoses is tobacco smoking, agent orange exposure, genetic predisposition, and coal dust exposure. Director's Exhibit 20 at 4. He further wrote the cause of Claimant's impairment is "[s]moking tobacco [greater than fifty percent] contribution, with substantial contribution from coal dust[,] [a]gent orange exposures[, and] probable asthmatic genetic predisposition." *Id.* at 5.

The ALJ observed that, although Dr. Pickerill stated there is a "substantial contribution from coal dust," *id.* at 5, he provided no explanation to support his conclusion that coal mine dust exposure contributed to Claimant's impairment. Decision and Order at 6. She further correctly noted Dr. Pickerill did not explain why any of the objective testing or imaging support a diagnosis of legal pneumoconiosis, and he provided no explanation connecting Claimant's coal mine dust exposure to his impairment other than to note his years working in the mines. Decision and Order at 6; Director's Exhibit 20 at 1-5. The ALJ thus permissibly discredited Dr. Pickerill's opinion as inadequately reasoned.⁵ *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002) (determination of whether a physician's opinion is adequately explained is within the purview of the ALJ as fact-finder); *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997) (assertion that does not explain how a physician reached the conclusion expressed does not constitute a reasoned opinion); *Kertesz*, 788 F.2d at 162-63; Decision and Order at 6. Therefore, contrary to Claimant's assertion, the ALJ's rationale for discrediting Dr. Pickerill's opinion satisfies the explanatory requirements of the Administrative Procedure Act (APA),⁶

why she finds Dr. Pickerill's opinion not credible, any error in suggesting that the Board asked her to substitute her opinion for the physician's is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁵ To the extent Claimant asserts Dr. Pickerill did, in fact, explain his conclusions, he asks us to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986) (ALJ has broad discretion to assess the credibility of medical opinions and assign them weight).

⁶ The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 5-6; *see also Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation under the APA is satisfied).

As Dr. Pickerill’s opinion is the only evidence that supports a finding of legal pneumoconiosis, we affirm the ALJ’s finding that Claimant failed to establish pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 6. Claimant’s failure to establish pneumoconiosis, an essential element of entitlement, precludes an award of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27 (1987); *Perry*, 9 BLR 1-1.

Accordingly, we affirm the ALJ’s Decision and Order on Remand Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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).