**U.S. Department of Labor**

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

BRB No. 18-0358 BLA

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| LLOYD E. LAMBERT | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CLINCHFIELD COAL COMPANY | ) | |
| (Self-Insured through PITTSTON COMPANY) | ) | DATE ISSUED: 05/21/2019 |
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| and | ) | |
| | ) | |
| WELLS FARGO DISABILITY MANAGEMENT | ) | |
| | ) | |
| 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 on Remand – Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand - Awarding Benefits (2012-BLA-06045) of Administrative Law Judge Dana Rosen, rendered on a claim filed on September 23, 2010,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.

In her initial 2015 Decision and Order Awarding Benefits, the administrative law judge found that claimant had 10.50 years of coal mine employment[2] and a smoking history of fifty-three pack years. She accepted the parties' stipulation that claimant is totally disabled by a respiratory or pulmonary impairment and further found his disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Accordingly, she awarded benefits.

In consideration of employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding of 8.675 years of coal mine employment, based on claimant's Social Security Administration (SSA) earnings records. *Lambert v. Clinchfield Coal Co.*, BRB No. 16-0196 BLA, slip op. at 5 (Feb. 2, 2017) (unpub.). The Board vacated, however, her overall finding of 10.50 years of coal mine employment because it was not adequately unexplained.[3] *Id*. at 6-7. The Board further vacated her findings on legal pneumoconiosis and disability causation because she did not adequately address whether

[1] Claimant filed a claim for benefits on February 18, 1981, but withdrew it on May 21, 1985. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Because claimant had fewer than fifteen years of coal mine employment, he did 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).

[3] The administrative law judge did not adequately discuss the "additional probative evidence" she relied on to find a total of 10.50 years or explain her calculations. *Lambert v. Clinchfield Coal Co.*, BRB No. 16-0196 BLA, slip op. at 5 (Feb. 2, 2017) (unpub.), *quoting* 2015 Decision and Order at 7.

the physicians' opinions diagnosing legal pneumoconiosis were reasoned[4] in view of her determinations on the lengths of claimant's coal mine employment and smoking histories.[5] *Id*. at 9. Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id*. at 10.

On remand, the administrative law judge determined that claimant established an additional 1.25 years of coal mine employment, for a total of 9.925 years. She again found claimant totally disabled due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §§718.202(a)(4), 718.204(c).

On appeal, employer contends the administrative law judge erred in crediting claimant with an additional 1.25 years of coal mine employment and in finding claimant totally disabled by legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file 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.[6] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R.

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[4] The Board affirmed the administrative law judge's discrediting of Dr. Fino's and Dr. Rosenberg's opinions that claimant does not have legal pneumoconiosis because they expressed views on the FEV1/FVC ratio that conflicted with the position of the Department of Labor in the preamble to the 2001 regulatory revisions. *Lambert*, BRB No. 16-0196 BLA, slip op. at 8-9.

[5] The Board affirmed the administrative law judge's determination that claimant had a fifty-three pack-year smoking history. *See Lambert*, BRB No. 16-0196 BLA, slip op. at 7.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

§§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).

**Legal Pneumoconiosis**

To establish legal pneumoconiosis, a 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(b). Employer asserts there is no reasoned medical opinion to satisfy claimant's burden of proof and the administrative law judge did not explain her findings in accordance with the Administrative Procedure Act (APA).[7] Employer's Brief at 7-12. We reject employer's arguments as without merit.

The administrative law judge gave controlling weight to Dr. Forehand's opinion that claimant has legal pneumoconiosis[8] and partial weight to the diagnoses of legal pneumoconiosis by Drs. Gallai and Klayton. Decision and Order on Remand at 9-10; Director's Exhibit 15; Claimant's Exhibits 3, 4. In accordance with the Board's remand instruction, she noted Dr. Forehand relied on a coal mine employment history of 8.25 years, which she considered to be consistent with her finding of 9.925 years. Decision and Order on Remand at 7, 9; Director's Exhibit 15. She permissibly credited Dr. Forehand's explanation that claimant's coal mine dust exposure as a roof bolter at the face of the mine was of sufficient duration to be a significantly contributing factor in his disabling obstructive respiratory impairment. *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); Director's Exhibit 15. Further, although Dr. Forehand relied on a smoking history of 40 pack-years, less than the administrative law judge's finding of 53 pack-years, she permissibly concluded that the difference of thirteen years "did not affect [his] credibility," as he still considered "a very significant smoking history."[9] *See Hicks*, 138 F.3d at 533;

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[7] 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).

[8] Dr. Forehand conducted the Department of Labor pulmonary evaluation and diagnosed legal pneumoconiosis, in the form of obstructive pulmonary disease and hypoxemia, related to coal dust exposure and cigarette smoking. Director's Exhibit 11.

[9] We reject employer's contention that Dr. Forehand's opinion is not reasoned because he did not specifically apportion the amount of claimant's obstruction caused by

*Akers*, 131 F.3d at 441; Decision and Order on Remand at 7; Director's Exhibit 11. Thus, we see no error in the administrative law judge's conclusion that Dr. Forehand's opinion was sufficiently reasoned to satisfy claimant's burden of proof. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

As the trier of fact, the administrative law judge is charged with determining the credibility of the evidence and whether a physician's opinion is adequately reasoned. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). We consider employer's arguments with respect to Dr. Forehand to be a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's finding that claimant established legal pneumoconiosis based on Dr. Forehand's opinion at 20 C.F.R. §718.202(a)(4),[10] and in consideration of the evidence as a whole under 20 C.F.R. §718.202(a).[11] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 209 (4th Cir. 2000); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441: Decision and Order on Remand at 9; 2015 Decision and Order at 44.

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smoking versus coal mine dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006). A physician need not apportion a specific percentage of a miner's lung disease to cigarette smoke versus coal mine dust exposure to establish the existence of legal pneumoconiosis, provided that the physician has credibly diagnosed a chronic respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000).

[10] Because we affirm the administrative law judge's findings that claimant established legal pneumoconiosis based on Dr. Forehand's opinion, we need not address employer's arguments regarding the opinions of Drs. Gallai and Klayton. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[11] Dr. Forehand relied on a coal mine employment history of 8.25 years, which is slightly less than the 8.675 years affirmed by the Board in the prior appeal. We need not address employer's argument that the administrative law judge erred in crediting claimant with an additional 1.25 years of coal mine employment, as any error in the administrative law judge's overall finding that claimant established 9.925 years is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

**Disability Causation**

Employer next contends the administrative law judge erred in finding claimant's legal pneumoconiosis a "substantially contributing" cause of his total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 12-14. Employer again asserts the administrative law judge did not explain the weight accorded the conflicting medical opinions under the APA. We disagree.

As noted by the administrative law judge, Drs. Fino and Rosenberg opined claimant's respiratory disability is unrelated to legal pneumoconiosis and caused entirely by smoking. Employer's Exhibits 7, 11, 12, 13. The administrative law judge rationally gave their opinions little weight because neither physician diagnosed legal pneumoconiosis, contrary to her determination that claimant has the disease. *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, 115-16 (4th Cir. 1995); Decision and Order on Remand at 10-12. In contrast, for the same reasons she credited Dr. Forehand's opinion on legal pneumoconiosis, the administrative law judge permissibly credited his opinion regarding the etiology of claimant's disabling respiratory impairment.[12] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Wojtowicz*, 12 BLR at 1-165 (1989); Decision and Order on Remand at 12; Director's Exhibit 15. Thus, we affirm the administrative law judge's determination that legal pneumoconiosis is a substantially contributing cause of claimant's total disability at 20 C.F.R. §718.204(c), and we further affirm her finding that claimant is entitled to benefits under 20 C.F.R Part 718.

[12] Dr. Forehand opined that both coal mine dust exposure and smoking significantly contributed to claimant's respiratory disability. Decision and Order on Remand at 12; Director's Exhibit 11.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge