



BRB No. 19-0013 BLA

MARIAN MORGAN	)	
(o/b/o DONALD E. MORGAN, deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 11/12/2019
	)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Paul E. Sutter (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-05306) of Administrative Law Judge Drew A. Swank, rendered on a claim filed 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 fourth time.<sup>1</sup> It involves a deceased miner's subsequent claim, filed on November 13, 2006,<sup>2</sup> and employer's request for modification.

Most recently, the Board vacated the administrative law judge's award of benefits because he improperly excluded the supplemental depositions of Drs. Fino and Renn as exceeding the evidentiary limitations. *Morgan v. Consolidated Coal Co.*, BRB No. 16-0353 BLA, slip op. at 5 (Apr. 26, 2017) (unpub.). In his September 5, 2018 Decision and Order on Remand, the administrative law judge admitted the deposition testimony and reconsidered all of the record evidence.<sup>3</sup> He found claimant established the miner was totally disabled by a respiratory or pulmonary impairment and therefore denied employer's modification request. 20 C.F.R. §§718.204(b)(2), 725.310. He further determined that claimant established the miner was totally disabled due to legal pneumoconiosis and thus awarded benefits.<sup>4</sup> 20 C.F.R. §§718.202(a)(4), 718.204(c).

On appeal, employer argues the administrative law judge erred in weighing the medical opinions on legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.<sup>5</sup>

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<sup>1</sup> The procedural history of the case is set forth in the following decisions: *Morgan v. Consolidation Coal Co.*, BRB No. 16-0353 BLA (Apr. 26, 2017); *Morgan v. Consolidation Coal Co.*, BRB Nos. 14-0256 BLA and 14-0273 BLA (July 30, 2015) (Boggs, J., concurring and dissenting); *Morgan v. Consolidation Coal Co.*, BRB No. 09-0739 BLA (July 30, 2010).

<sup>2</sup> The miner filed a prior claim on October 23, 2003, which the district director denied on April 17, 2004, for failure to establish any element of entitlement. Director's Exhibit 1. The miner died on November 26, 2012, while his subsequent claim was pending. Claimant is the miner's widow. She is pursuing the miner's claim on his behalf.

<sup>3</sup> The administrative law judge adopted the evidence summaries and credibility findings rendered in all of the prior decisions. 2018 Decision and Order on Remand at 23. He found the testimony in the new depositions did not alter his prior findings on legal pneumoconiosis or disability causation. *Id.* at 23, 31-32.

<sup>4</sup> Based on the parties' stipulation the miner had fewer than fifteen years of coal mine employment, claimant is not able to invoke the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

<sup>5</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that: the miner was totally disabled, 20 C.F.R. §718.204(b)(2); claimant established a change in

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order on Remand Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>6</sup> 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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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).

### **Legal Pneumoconiosis**

To establish legal pneumoconiosis, claimant must prove the miner had 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). The administrative law judge gave controlling weight to Dr. Celko's opinion that the miner had legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to cigarette smoking and coal mine dust exposure. Director's Exhibit 16; Claimant's Exhibit 4. He discredited the contrary opinions of Drs. Rosenberg, Fino, and Renn that the miner did not have legal pneumoconiosis because he found they did not rationally explain why the miner's COPD/emphysema was due entirely to smoking. Director's Exhibit 49; Employer's Exhibits 6-8.

Employer contends Dr. Celko's opinion is legally insufficient to establish legal pneumoconiosis because he indicated it was not possible to distinguish between respiratory impairments caused by smoking and coal dust exposure. Employer's Brief at 27; Director's Exhibit 16. Contrary to employer's argument, a physician need not apportion a specific percentage of a miner's lung disease or impairment to cigarette smoke as opposed

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an applicable condition of entitlement, 20 C.F.R. §725.309; and employer is not entitled to modification, 20 C.F.R. §725.310. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 2018 Decision and Order on Remand at 11.

<sup>6</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 7.

to coal mine dust exposure to establish the existence of legal pneumoconiosis. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). The physician need only credibly diagnose the disease or impairment as “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” *See* 20 C.F.R. §718.201(b).

Here, Dr. Celko specifically stated that coal dust exposure was a “substantial cause” of the miner’s disabling respiratory impairment. Director’s Exhibit 16; Claimant’s Exhibit 4. The administrative law judge permissibly found Dr. Celko’s opinion documented and reasoned, as it was based on the totality of his ten-year treatment of the miner, including relevant work and smoking histories,<sup>7</sup> physical findings, the miner’s symptoms and complaints, and objective testing showing COPD and emphysema. *See* 20 C.F.R. §718.104(d); *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); 2018 Decision and Order on Remand at 25. He also permissibly found Dr. Celko’s explanations for why the miner’s COPD/emphysema were caused by both smoking and coal mine dust exposure to be rational and consistent with the science the Department of Labor relied on in the preamble. *See Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257 (3d Cir. 2011); 2018 Decision and Order on Remand at 23 n.18, *citing* 65 Fed. Reg. 79,920, 79,944-43 (Dec. 20, 2000). We therefore affirm the administrative law judge’s finding that Dr. Celko’s opinion is sufficient to establish legal pneumoconiosis and reject employer’s arguments.<sup>8</sup>

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<sup>7</sup> Employer generally asserts Dr. Celko’s opinion on legal pneumoconiosis is not credible because he relied on “a smoking history of approximately fifty years when in fact the record supports that the miner’s smoking history was closer to [one hundred] years.” Employer’s Brief at 27. The administrative law judge specifically determined, however, that the miner’s smoking history was “between 53.5 and 69.3” pack-years, after he averaged the various smoking histories the physicians reported. March 23, 2016 Decision and Order on Remand at 11. Employer does not identify any error by the administrative law judge in rendering this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

<sup>8</sup> Because the administrative law judge provided valid reasons for giving controlling weight to Dr. Celko’s opinion, we need not address employer’s arguments regarding the weight given the opinions of Drs. Houser, Rasmussen, and Jaworski, who also diagnosed legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer’s Brief at 26-27.

We also reject employer's contention the administrative law judge erred in discrediting the opinions of Drs. Renn, Rosenberg, and Fino that the miner did not have legal pneumoconiosis. The administrative law judge accurately noted Drs. Renn and Rosenberg excluded coal dust exposure as a causative factor for the miner's obstructive lung disease based, in part, on their views that his reduced FEV<sub>1</sub>/FVC ratio was inconsistent with obstruction caused by coal mine dust exposure. 2018 Decision and Order on Remand at 27-28. He permissibly found their opinions conflict with the preamble's recognition that coal dust exposure can cause clinically significant COPD with associated decrements in certain measures of lung function, "especially FEV<sub>1</sub> and the ratio of FEV<sub>1</sub>/FVC."<sup>9</sup> 2018 Decision and Order on Remand at 28, *citing* 65 Fed. Reg. at 79,943; *see Obush*, 650 F.3d at 257; *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491 (6th Cir. 2014); *Morgan v. Consolidation Coal Co.*, BRB No. 16-0353 BLA, slip. op. at 6 (Apr. 26, 2017) (unpub.); Director's Exhibit 49 at 34; Employer's Exhibits 1 at 12, 7 at 42, 8 at 28.

The administrative law judge also correctly noted Drs. Renn and Fino excluded legal pneumoconiosis, in part, because the pulmonary function studies showed reversibility of the miner's obstruction after use of a bronchodilator. Director's Exhibit 78; Employer's Exhibit 6 at 8-10. He permissibly found their opinions unpersuasive on the etiology of the miner's COPD because they failed to adequately explain why the "irreversible disabling component" of the miner's respiratory impairment was not caused by the miner's thirteen years of coal mine dust exposure. 2018 Decision and Order on Remand at 26, 29; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

The administrative law judge is charged with determining the credibility of the evidence and whether a physician's opinion is adequately reasoned. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163. The Board is not empowered to reweigh the evidence. *See Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We therefore affirm the

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<sup>9</sup> The administrative law judge noted that Dr. Rosenberg cited to a study post-dating the preamble to support his opinion on the FEV<sub>1</sub>/FVC ratio. 2018 Decision and Order on Remand at 29 n. 20. He found the study did not invalidate the science in the preamble. *Id.* We affirm the administrative law judge's determination as it is unchallenged. *See Skrack*, 6 BLR at 1-711.

administrative law judge's finding that claimant established the miner had legal pneumoconiosis.<sup>10</sup> 2018 Decision and Order on Remand at 30.

### **Disability Causation**

To establish disability causation, claimant must prove that pneumoconiosis was a “substantially contributing cause” of the miner’s totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a “substantially contributing cause” of a miner’s total disability if it had “a material adverse effect on the miner’s respiratory or pulmonary condition,” or if it “[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] caused by a disease or exposure unrelated to coal mine employment.” 20 C.F.R. §718.204(c)(1)(i), (ii).

Contrary to employer’s contention, the administrative law judge rationally discredited the opinions of Drs. Renn, Rosenberg, and Fino that the miner’s respiratory disability was unrelated to pneumoconiosis because they did not diagnose legal pneumoconiosis. *See Soubik*, 366 F.3d at 234; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 668 (6th Cir. 2015); 2018 Decision and Order on Remand at 32. We also see no error in the administrative law judge’s finding that Dr. Celko’s opinion satisfies claimant’s burden of proof. Dr. Celko opined the miner’s legal pneumoconiosis “significantly contributed to and substantially aggravated” his disabling respiratory impairment. 2018 Decision and Order on Remand at 56-57; Director’s Exhibit 14; Claimant’s Exhibit 4. Having credited Dr. Celko’s opinion that the miner’s disabling COPD/emphysema is legal pneumoconiosis, the administrative law judge rationally credited his opinion that claimant’s total disability is due to pneumoconiosis. *See Balsavage*, 295 F.3d at 396; 2018 Decision and Order on Remand at 32. We therefore affirm the administrative law judge’s finding claimant established the miner was totally disabled due to legal pneumoconiosis,<sup>11</sup> 20 C.F.R. §718.204(c), and we further affirm the award of benefits.

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<sup>10</sup> We affirm, as unchallenged, the administrative law judge’s finding that Dr. Basheda’s opinion is based on a limited evidentiary record and thus is not probative on the issue of legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 2018 Decision and Order on Remand at 23; 2014 Final Decision and Order on Modification at 21.

<sup>11</sup> Because we affirm the administrative law judge’s finding that Dr. Celko’s opinion is sufficient to establish disability causation, we need not address employer’s arguments regarding the weight given the opinions of Drs. Jaworski, Rasmussen, and Houser on the

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

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

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issue. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). Employer's Brief at 32-34.