



BRB No. 22-0192 BLA

RANDY G. JACKSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BUCK CREEK COAL, INCORPORATED)	
)	
and)	
)	
SECURITY INSURANCE COMPANY OF)	DATE ISSUED: 5/04/2023
HARTFORD)	
)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore) Carbondale, Illinois, for Claimant.

James M. Poerio (Poerio & Walter, Inc.) Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2012-BLA-05132), rendered on a claim filed on November 23, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant worked as a coal miner for fourteen years and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Because Claimant had less than fifteen years of coal mine employment, the ALJ 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 Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established he has legal pneumoconiosis and is totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). Thus, the ALJ awarded benefits commencing November 2009.

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis, total disability, and disability causation. Employer also challenges the date benefits commence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

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.² 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 (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 establishes 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 This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12-23.

(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, 1-2 (1986) (en banc).

Legal Pneumoconiosis

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(a)(2), (b); *see Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 998 (7th Cir. 2005). The ALJ considered five medical opinions and Claimant’s treatment records. He credited the

opinions of Drs. Houser,³ Ryon,⁴ Go,⁵ and Dultz⁶ that Claimant's chronic obstructive pulmonary disease (COPD) is due to both smoking and coal dust exposure, over the

³ Dr. Houser evaluated Claimant on January 11, 2010. Director's Exhibit 8. He diagnosed moderately severe chronic obstructive pulmonary disease (COPD) with "some bronchodilator response" based on Claimant's pulmonary function test and chronic bronchitis based on his symptoms. *Id.* at 10. Considering Claimant worked in coal mine employment for sixteen years and smoked for thirty years and four months, he attributed Claimant's COPD and chronic bronchitis to both coal mine employment and smoking. *Id.* at 6, 10; Director's Exhibit 38.

⁴ Dr. Ryon conducted the Department of Labor's complete pulmonary evaluation of Claimant on May 7, 2015, and diagnosed moderate COPD that "improves with bronchodilator" based on Claimant's pulmonary function test. Director's Exhibit 41 at 4-5. Considering a fifteen-year coal mine employment history and thirty-two pack-year smoking history, Dr. Ryon attributed Claimant's COPD to coal mine employment and smoking. *Id.* at 4; Director's Exhibit 48. He explained, "the risk of developing COPD following each year of coal mine dust exposure approximates the same risk as if one pack of cigarettes per day were smoked for a year." Director's Exhibit 48.

⁵ Dr. Go conducted a medical records review and issued a report dated February 16, 2021. Claimant's Exhibit 2. He diagnosed chronic bronchitis, COPD, and emphysema based on Claimant's symptoms, pulmonary function tests showing both "significant" and "no significant" response to bronchodilator, and x-rays. *Id.* at 4-7, 11. Considering a fourteen-year coal mine employment history and a smoking history of twenty to forty years, he attributed Claimant's lung condition to both coal mine employment and smoking. *Id.* at 11.

⁶ Dr. Dultz's November 27, 2019 treatment note references that Claimant worked in coal mine employment for fifteen years and "is smoking a half a pack of cigarettes per day but averaged one to 2 packs a day for most of the last 37 years." Claimant's Exhibit 4 at 6. Dr. Dultz stated Claimant "appears to have underlying COPD" and that he "suspect[s] Claimant] has legal pneumoconiosis meaning that: Coal dust exposure has contributed to his COPD but not necessarily interstitial lung disease." *Id.*

contrary opinions of Drs. Selby⁷ and Tuteur⁸ that it is due entirely to smoking. Decision and Order at 14-18; Director’s Exhibits 33 at 7, 38 at 4, 48 at 1; Claimant’s Exhibit 2 at 14; Employer’s Exhibit 1 at 4-8.

Employer first asserts the ALJ erred in finding Claimant established legal pneumoconiosis because it is an irreversible lung disease and “every pulmonary function test of record, including the two most recent in 2019 and 2020, the only two to produce qualifying values, demonstrated statistically significant reversibility following the administration of aerosol bronchodilators.”⁹ Employer’s Brief at 8. But Employer is not a medical expert and it does not identify any physician who either concluded the pulmonary function studies showed complete reversibility or explained why the irreversible portion of Claimant’s disabling impairment would not be consistent with legal pneumoconiosis.¹⁰ See *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993) (interpretation of medical data is for medical experts). Thus, we reject Employer’s assertion of error.

Employer next contends the ALJ erred in crediting the opinions of Drs. Houser, Ryon, and Go because they relied on an inaccurate smoking history. Employer’s Brief at 10. It states that the record evidence supporting a “potential maximum [smoking history] of seventy [pack-]years is material and relevant” to the credibility of the physicians’

⁷ Dr. Selby examined Claimant on December 1, 2011. Director’s Exhibit 33. He diagnosed a mild obstruction due to smoking and asthma, not coal dust exposure. *Id.* at 7-8. He also diagnosed dyspnea on exertion, which he attributed to Claimant’s smoking, asthma, obesity, deconditioning, and/or hypertension. *Id.*

⁸ Dr. Tuteur examined Claimant on October 22, 2020; he diagnosed Claimant with severe COPD due entirely to smoking and not coal dust exposure. Employer’s Exhibit 1 at 3-4. He explained that never-smoking miners develop COPD approximately one percent of the time, while smoking non-miners develop COPD approximately twenty percent of the time. *Id.* at 4.

⁹ A “qualifying” pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A “non-qualifying” study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i).

¹⁰ Employer mischaracterizes Dr. Go’s opinion as stating Claimant’s partial response to bronchodilators is “inconsistent with the presence of an irreversible disease process.” Employer’s Brief at 9. Dr. Go did not make such a statement. Rather, he summarized each test as demonstrating either a “significant” or “no significant” response to bronchodilators. Claimant’s Exhibit 2 at 4-7.

opinions as to legal pneumoconiosis. Employer's Brief at 9-10 (referencing Dr. Dultz's treatment records at Claimant's Exhibit 4). However, the parties stipulated at the hearing that Claimant has a smoking history of at least thirty years, which the ALJ specifically noted. Decision and Order at 3; Hearing Transcript at 25. He thus permissibly assessed the medical opinions based on whether they understood Claimant smoked for at least thirty years.¹¹ See *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990). In addition, all of the physicians, including Employer's experts, relied on a similar length of coal mine employment history. Consequently, Employer fails to persuasively explain why its alleged error requires remand. See *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Because Employer raises no other challenge to the ALJ's conclusion that the opinions of Drs. Houser, Ryon, and Go are reasoned and documented, we affirm the ALJ's determination that their opinions are sufficient to establish Claimant has legal pneumoconiosis. See 20 C.F.R. §718.202(a)(4); *Williams*, 400 F.3d at 998; *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327 (7th Cir. 1992); Decision and Order at 14-16; Director's Exhibits 33 at 7, 38 at 4, 48 at 1; Claimant's Exhibit 2 at 14. Additionally, although Employer generally asserts the opinions of its experts as to the existence of legal pneumoconiosis are more credible, it does not identify any error in the ALJ's specific reasons for finding the opinions of Drs. Tuteur and Selby inadequately reasoned.¹² See *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983). We therefore affirm the ALJ's rejection of their opinions. See *Poole*, 897 F.2d at 895; *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 336 (7th Cir. 2002); Decision and Order at 16-17.

¹¹ Moreover, the ALJ is not required, as Employer suggests, to discredit a physician's opinion that is based on an inaccurate smoking history, even if we were to assume Claimant has a maximum smoking history of seventy years as Employer alleges. See *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); *Huscoal v. Director, OWCP [Clemons]*, 48 F.4th 480, 491-92 (6th Cir. 2022).

¹² The ALJ found Dr. Tuteur based his opinion on general statistics rather than the specifics of Claimant's case and failed to explain how he eliminated Claimant's significant coal mine employment history as a contributing cause of his smoking-related impairment. Decision and Order at 16-17; Employer's Exhibit 1; see *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726 (7th Cir. 2008) (ALJ may discredit opinion that is based on statistical averages).

Employer's arguments on legal pneumoconiosis amount to a request to reweigh the evidence, which we are not permitted to do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's conclusion that Claimant established legal pneumoconiosis at 20 C.F.R. § 718.202(a)(4), and in consideration of the evidence as a whole.

Disability Causation¹³

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. § 718.204(c)(1). 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 which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. § 718.204(c)(i), (ii).

Because Drs. Houser, Ryon, and Go diagnosed disabling COPD, which the ALJ permissibly found constitutes legal pneumoconiosis, we affirm the ALJ's finding that their opinions are sufficiently reasoned to establish Claimant is totally disabled due to legal pneumoconiosis. See *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 18-19; Director's Exhibits 38 at 4-5, 48 at 1; Claimant's Exhibit 2 at 14. The ALJ also permissibly discredited the opinions of Drs. Selby and Tuteur regarding disability causation, as he found no reason to conclude "[their] judgment – that pneumoconiosis is not causing or contributing to [Claimant's] disability – did not rest directly upon their disagreement" that Claimant has legal pneumoconiosis, contrary to the ALJ's finding that Claimant has the disease. *Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 735 (7th Cir. 2013); Decision and Order at 19; Employer's Brief at 14-15. Because Employer does not otherwise challenge the ALJ's conclusion that Claimant is totally disabled due legal pneumoconiosis, we affirm it. 20 C.F.R. § 718.204(c)(1); Decision and Order at 18-19. Consequently, we affirm the ALJ's award of benefits.

¹³ In challenging the ALJ's finding of total disability, Employer generally asserts the same arguments it raised with regard to the existence of legal pneumoconiosis – that the pulmonary function studies show partial reversibility and the physicians did not consider an accurate smoking history. Having rejected Employer's arguments previously and because they conflate the issues of total disability and the cause of Claimant's impairment, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. § 718.204(b).

Benefits Commencement Date

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). The ALJ found the record does not establish precisely when Claimant first became totally disabled due to pneumoconiosis. He also concluded there is no credible evidence showing Claimant was not totally disabled due to pneumoconiosis at any time after he filed his claim. Decision and Order at 20. Therefore, the ALJ found Claimant is entitled to benefits beginning November 2009. *Id.*

Employer contends the first credible evidence that Claimant was totally disabled by a respiratory or pulmonary impairment was Dr. Tuteur's October 22, 2020 examination. Employer's Brief at 15-17. It asserts that Dr. Houser's diagnosis of total disability due to pneumoconiosis on January 11, 2010, is based on an invalid pulmonary function study. Employer's Brief at 8, 15. However, Employer did not challenge the validity of this study while the case was pending before the ALJ and cannot do so for the first time on appeal. *See Burris*, 732 F.3d at 730; Employer's Closing Brief at 6 (characterizing Dr. Houser's January 11, 2019 pulmonary function study as "valid"). Employer also argues Dr. Ryon's diagnosis of total disability due to pneumoconiosis on May 17, 2015, is not credible because he relied on an inaccurate smoking history. Employer's Brief at 16-17. However, as noted above, *see supra* note 13, the physician's understanding of Claimant's smoking history is not relevant to the issue of total disability.

Because it is supported by substantial evidence, we affirm the ALJ's permissible finding that the record does not establish the precise onset date of Claimant's total disability due to pneumoconiosis and contains no credible evidence Claimant was not totally disabled due to pneumoconiosis at any time after he filed his claim. Decision and Order at 20. We thus affirm the ALJ's finding that Claimant's benefits commence as of November 2009, the month he filed this claim. 20 C.F.R. § 725.503(b); *Edmiston*, 14 BLR at 1-69; Decision and Order 20.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge