U.S. Department of Labor

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

BRB No. 19-0181 BLA

MELVIN A. ROWE (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLGA COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 03/27/2020
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05210) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a subsequent claim[1] filed on November 26, 2013, pursuant to the Black Lungs Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited the miner with 9.8 years of coal mine employment[2] and found the new evidence established total disability. 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). Considering the merits of the claim, he found the miner had both clinical pneumoconiosis[3] that arose out of coal mine employment and legal pneumoconiosis[4] in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to coal mine dust exposure and cigarette smoking. 20 C.F.R. §§718.202(a), 718.201(b), 718.203(c). Finally, he found the miner was totally disabled due to pneumoconiosis and awarded benefits. 20 C.F.R. §718.204(c).

On appeal, employer asserts the administrative law judge erred in finding the evidence established clinical and legal pneumoconiosis and that the miner's total disability was due to pneumoconiosis. Claimant responds, urging affirmance of the award. The

[1] The miner filed four previous claims, all of which were finally denied. Director's Exhibits 1-3. On October 29, 2009, the district director denied the miner's most recent prior claim, filed on October 29, 2008, because he failed to establish pneumoconiosis or total disability. Director's Exhibit 3. The miner died on February 6, 2016. Decision and Order at 2 (unpaginated). Claimant, his surviving spouse, is pursuing the miner's claim on behalf of his estate. *Id.*

[2] Because the miner had fewer than fifteen years of coal mine employment, claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] "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).

[4] "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). A disease arising out of coal mine employment 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).

Director, Office of Workers' Compensation Programs, has not filed a brief.[5] Employer has filed a reply brief reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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).

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 (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 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).

Employer argues the administrative law judge erred in finding the biopsy evidence and medical opinions supported a finding of legal pneumoconiosis. Employer's Brief at 13-24. In order to establish legal pneumoconiosis, claimant must prove the miner had a "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).

The administrative law judge considered the biopsy reports of Drs. Oesterling and Perper, who reviewed lung tissue slides, lymph node slides, and pleural tissue slides from

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings of 9.8 years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment, and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-8, 41, 54 (unpaginated).

[6] The record indicates the miner's coal mine employment occurred in West Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

a left upper lobe wedge resection that was done to remove cancer.[7] Decision and Order at 13-16, 46-48 (unpaginated); Employer's Exhibits 15, 26; Claimant's Exhibit 11. He accurately noted that both physicians identified emphysema but offered differing descriptions of whether coal dust was present. Decision and Order at 48. Dr. Oesterling reported finding no black pigment in the six lung tissue slides he reviewed and reported only "modest quantities of black pigment" shown by partial polarized light to be coal dust in one lymph node slide. Employer's Exhibit 15 at 3-4; Decision and Order at 14-15 (unpaginated). Based on the lack of black pigment but the presence of "smokers' macrophages," Dr. Oesterling identified smoking as "the most likely etiologic agent for [the] emphysematous changes." Employer's Exhibit 15 at 4. In contrast, Dr. Perper diagnosed legal pneumoconiosis in the form of emphysema due in part to coal mine dust exposure. He described finding significant black anthracotic deposits on all eleven lung tissue slides and reported "severe fibro-anthracosis with multiple birefringent silica crystals" in all five lymph node slides. Claimant's Exhibit 11 at 45-47. Dr. Perper concluded that "significant and substantial silica coal dust" was present in the miner's lungs. *Id*. at 54, 58.

The administrative law judge found Dr. Oesterling's report poorly documented because Dr. Oesterling described his findings on only six slides whereas "Dr. Perper's report contains descriptions of all eighteen slides." Decision and Order at 47 (unpaginated). According "significantly more weight to Dr. Perper's conclusions for being better documented," he found that the miner's lungs "contained coal dust and structural changes related to coal dust." *Id*. at 47, 52 (unpaginated).

Employer contends this was error because Dr. Oesterling identified some coal dust but explained why other findings suggested that smoking caused the emphysema. Employer's Brief at 13-16. We disagree. The administrative law judge found Dr. Perper's conclusion on the degree of coal dust present was better documented because Dr. Perper provided a more comprehensive description of the tissue slides: for nine of the fifteen slides in which he described seeing anthracotic pigment, Dr. Oesterling provided no contrary description. Decision and Order at 14-16, 47 (unpaginated). The administrative law judge considered Dr. Oesterling's explanation that it would be inefficient to describe each slide, but reasonably found the doctor's explanation unpersuasive because there were only eighteen slides requiring review. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997), Employer's Exhibit 26 at 34. The Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. We therefore reject employer's argument that the administrative law judge erred in according more weight to Dr. Perper's biopsy

[7] The record includes eighteen biopsy slides in three sets: eleven slides of lung tissue, five slides of lymph nodes, and two slides of pleura. Decision and Order at 46-47 (unpaginated).

conclusions for being better documented.[8] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

The administrative law judge next considered the medical opinions of Drs. Forehand, Green, Perper,[9] Basheda, and Fino. All five physicians diagnosed the miner with a disabling obstructive lung impairment. Decision and Order at 53 (unpaginated); Director's Exhibits 14, 27, 33; Claimant's Exhibits 2, 11; Employer's Exhibits 12, 24, 25. Drs. Forehand, Green, and Perper attributed his COPD and emphysema to both smoking and coal mine dust exposure,[10] Director's Exhibit 14 at 4-5; Claimant's Exhibits 2 at 34; 11 at 58-60, while Drs. Basheda and Fino related them solely to smoking. Director's Exhibit 33 at 12-18; Employer's Exhibit 12 at 35-38.

The administrative law judge found the opinions of Drs. Forehand, Green, and Perper well-reasoned and entitled to great weight, and discounted the contrary opinions of Drs. Basheda and Fino as not well-reasoned. Decision and Order at 48-51 (unpaginated). He therefore found the medical opinions established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

We initially reject employer's contention that the opinions of Drs. Forehand and Green are not well-documented because they did not review later-developed evidence, including additional chest x-rays, CT scan interpretations, pathology evidence, and the records of the miner's lung cancer treatment. Employer's Brief at 17-18. The administrative law judge permissibly relied on these opinions because he found them based on the totality of information from their own examinations, including relevant work and

[8] Notably, the administrative law judge did not rely solely on the biopsy evidence to conclude the miner had legal pneumoconiosis. Decision and Order at 47-48, 53 (unpaginated). As employer concedes, the miner's "emphysema was most severe in the lower lobes of his lungs, which were not represented in the biopsy." Employer's Brief at 15 n.1; *see also* 20 C.F.R. §718.106(c) ("A negative biopsy is not conclusive evidence the miner does not have pneumoconiosis.").

[9] In addition to reviewing the miner's biopsy slides, Dr. Perper reviewed the medical evidence developed in the claim, and the miner's medical records, and submitted a combined biopsy report and medical opinion. Claimant's Exhibit 11 at 2-3.

[10] Dr. Perper also opined that the miner's lung cancer constituted legal pneumoconiosis, citing medical literature that silica in coal mine dust is carcinogenic. Claimant's Exhibit 11 at 61-68. The administrative law judge discredited that portion of Dr. Perper's opinion. Decision and Order at 50-51 (unpaginated). Drs. Basheda, Fino, and Oesterling agreed that the miner's lung cancer was due to smoking. Director's Exhibit 33; Employer's Exhibits 12, 15, 24-26.

social histories, pulmonary function study results, the miner's symptoms, and physical findings. Decision and Order at 48, 50 (unpaginated); s*ee Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9 (4th Cir. 1998). Moreover, in setting forth this assertion, employer does not identify any of this evidence with specificity or attempt to explain how it undermines the physicians' opinions that the miner's impairment was significantly related to his coal mine dust exposure.[11] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the alleged "error to which [it] points could have made any difference").

We also reject employer's assertion that the administrative law judge irrationally credited Dr. Forehand's most recent opinion relating the miner's obstructive lung disease to his coal mine dust exposure when, in an earlier opinion, Dr. Forehand attributed the miner's impairment to smoking. Employer's Brief at 20-22. In connection with a prior claim, Dr. Forehand examined the miner in April 2000, noted a ten-year history of underground coal mine employment and opined that, while the miner had a totally disabling respiratory impairment, it was related to smoking. Director's Exhibit 2 at 81-83.

Dr. Forehand evaluated him in connection with the current claim on December 18, 2013. He again noted ten years of coal mine employment, but now diagnosed legal pneumoconiosis in the form of obstructive lung disease due to both smoking and coal mine dust exposure. Director's Exhibit 14 at 20-21. Dr. Forehand explained he changed his opinion because he obtained a more thorough and detailed occupational history from the miner in the more recent examination, such that he now understood the miner to have spent much more time working at the face of the mine being exposed to coal and silica dust.[12] Director's Exhibits 14; 27 at 13, 18-20, 25, 31. The administrative law judge considered employer's argument that Dr. Forehand's opinion should be discredited but permissibly concluded his explanation was reasonable. Decision and Order at 48 (unpaginated); *see Underwood*, 105 F.3d at 949.

We likewise reject employer's assertion that the administrative law judge improperly credited the opinions of Drs. Forehand, Green, and Perper because they could

[11] For example, employer generally asserts Drs. Green and Forehand should be discredited because they did not review the pathology evidence. The administrative law judge found, however, that the pathology evidence – Dr. Perper's biopsy report in particular – supports a finding that the miner had coal mine dust-related structural changes in his lungs. Decision and Order at 52 (unpaginated).

[12] Dr. Forehand noted the miner worked as a miner operator and a roof bolter, and breathed in so much dust that he coughed up thick, black phlegm. Director's Exhibit 27 at 19-21.

not differentiate between the relevant contribution of the miner's coal mine dust exposure as opposed to his smoking to his disabling obstructive impairment. Employer's Brief at 18-20, 22-24. The inability to identify the precise percentage of impairment attributable to his coal mine dust exposure does not render their opinions unreasoned, as "doctors need not make such particularized findings" in the context of determining the existence of legal pneumoconiosis. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006). Rather, medical opinions can establish legal pneumoconiosis when the physician credibly diagnoses a lung disease or impairment that arose at least in part out of dust exposure from coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309-11 (4th Cir. 2012).

As the administrative law judge summarized, Dr. Forehand expressly concluded that while it is impossible to determine the exact extent of the contribution of the miner's coal mine dust exposure as opposed to his smoking, coal mine dust substantially contributed to his impairment. Director's Exhibit 14 at 4-5. The administrative law judge further noted Dr. Forehand's explanation that the two are additive because cigarette smoke aggravates the effects of coal mine dust inhalation by inhibiting dust clearance from the lungs. *Id*. at 4. Dr. Green likewise noted it is impossible to distinguish the relative contribution of the miner's smoking and his coal mine dust exposure, but each was a significant contributing and aggravating factor. Claimant's Exhibit 2 at 3-4. Dr. Perper similarly explained that while there is no way to distinguish between the respective contributions of the miner's smoking and coal mine dust exposure, the progression of the miner's symptoms after he ceased smoking demonstrates coal mine dust was the greater contributing factor. Claimant's Exhibit 11 at 58-60. Because each physician identified coal mine dust as a significant contributor to the miner's impairment, their opinions satisfy the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(b). Moreover, the administrative law judge permissibly found their explanations well-reasoned and consistent with the premises underlying the regulations that the effects of coal mine dust and cigarette smoke can be additive. Decision and Order at 49 (unpaginated); *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); *Energy W. Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017).

We additionally reject employer's argument that because the administrative law judge did not accept Dr. Perper's conclusion that the miner's lung cancer constituted legal pneumoconiosis, he erred in crediting Dr. Perper's opinion that the miner's emphysema was related to coal mine dust exposure. Employer's Brief at 16-17. The administrative law judge need not agree with every diagnosis an expert makes; he may reasonably credit part of an expert's opinion as long as it is not inconsistent with his own findings. *See Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986).

Employer also asserts the administrative law judge irrationally discredited the opinions of Drs. Basheda and Fino. Employer's Brief at 22-24. We disagree. As the

administrative law judge noted, both physicians relied in part on their view that the average reduction in FEV1 cigarette smoking causes is greater than the average reduction the inhalation of coal mine dust causes. Director's Exhibit 33 at 12-15; Employer's Exhibits 12 at 38; 24 at 13-15. The administrative law judge permissibly discounted this reasoning as being based more on general statistics than the miner's specific condition. *See Looney*, 678 F.3d at 312. Further, he rationally discounted their attribution of the miner's impairment solely to his smoking because neither physician adequately addressed the possibility of the additive effects of the miner's smoking and his coal mine dust exposure. *See Stallard*, 876 F.3d at 674. Additionally, the administrative law judge permissibly found Dr. Basheda did not persuasively explain why the partial reversibility of the miner's obstructive impairment enabled him to exclude the miner's coal dust exposure as a contributor to his disabling impairment that remained after bronchodilation. *See Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Employer's Exhibit 12 at 38.

As the trier of fact, the administrative law judge determines 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*, 105 F.3d at 949. Employer's arguments with respect to Drs. Forehand, Fino, Basheda, Green, and Perper constitute a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. We therefore affirm the administrative law judge's finding claimant established legal pneumoconiosis based on the opinions of Drs. Forehand, Green, and Perper and in consideration of the evidence as a whole. 20 C.F.R. §718.202(a); *see Compton*, 211 F.3d at 210.

Employer next argues the administrative law judge erred in finding the miner's total disability was due to legal pneumoconiosis. Employer's Brief at 26-30. 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 if it has "a material adverse effect on [the miner's] respiratory or pulmonary condition," or if it "[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)(1)(i), (ii).

As we held above, the administrative law judge permissibly relied on the opinions of Drs. Forehand, Green, and Perper to find legal pneumoconiosis established in the form of disabling COPD/emphysema due in significant part to the miner's coal mine dust exposure. Thus, he rationally found these opinions also supported a finding that legal pneumoconiosis "substantially contributed to [the miner's] total disability." Decision and Order at 55 (unpaginated); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003).

Moreover, the administrative law judge permissibly discounted the opinions of Drs. Fino and Basheda because they did not diagnose legal pneumoconiosis. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); Decision and Order at 55 (unpaginated). Therefore, we affirm the administrative law judge's finding that the miner's total disability was due to legal pneumoconiosis.[13] 20 C.F.R. §718.204(c).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[13] As we affirm the administrative law judge's finding that claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis, we need not address employer's arguments that the administrative law judge erred in finding the miner also had clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-17.