

BRB No. 13-0323 BLA

PAUL WARD )  
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 Claimant-Respondent )  
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 v. )  
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 CONSOLIDATION COAL COMPANY ) DATE ISSUED: 04/14/2014  
 )  
 and )  
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 CONSOL ENERGY, INCORPORATED )  
 )  
 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 on Third Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Third Remand (2003-BLA-5119) of Administrative Law Judge Alice M. Craft, rendered on a claim filed on May 14, 2001, pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C §§901-944 (Supp. 2012) (the Act).<sup>1</sup> This case is before the Board for the fourth time.<sup>2</sup> Most recently, in consideration of employer's appeal, the Board vacated the administrative law judge's award of benefits because she failed to explain the bases for her findings that claimant established the existence of legal pneumoconiosis<sup>3</sup> under 20 C.F.R. §718.202(a)(4), and disability causation pursuant to 20 C.F.R. §718.204(c).<sup>4</sup> The Board remanded the case for consideration of the conflicting medical opinions of Drs. Crater, Dahhan and Jarboe as to whether claimant is totally disabled due to pneumoconiosis. *Ward v. Consolidation Coal Co.*, BRB No. 10-0295 BLA (Feb. 11, 2011) (unpub.). The Board specifically instructed the administrative law judge to consider the underlying documentation and supporting rationale offered by each of the physicians in rendering her credibility findings. *Id.* On remand, the administrative law judge gave controlling weight to Dr. Crater's opinion, that claimant is totally disabled by an obstructive respiratory impairment related to his coal dust exposure, over the contrary opinions of Drs. Dahhan and Jarboe, that claimant's disabling respiratory disease is due entirely to smoking. Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in relying on Dr. Crater's opinion to award benefits. Employer maintains that Dr. Crater's opinion is not credible because he did not provide a detailed explanation for why he attributed claimant's respiratory disease to smoking and coal dust exposure. Employer asserts that

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<sup>1</sup> The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as the claim was filed prior to January 1, 2005. *See* Pub. L. No. 111-148, 124 Stat 119, §1556, 124 Stat 119, 260 (2010); Director's Exhibit 2.

<sup>2</sup> We incorporate the procedural histories of the case set forth in the Board's prior decisions, *P.W. [Ward] v. Consolidation Coal Co.*, BRB No. 07-0705 BLA (May 20, 2008) (unpub.), and *Ward v. Consolidation Coal Co.*, BRB No. 10-0295 BLA (Feb. 11, 2011) (unpub.).

<sup>3</sup> 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). 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

<sup>4</sup> The Board previously affirmed the administrative law judge's findings that claimant established thirty-one years of coal mine employment and total disability pursuant to 20 C.F.R. §718.204(b). *See Ward*, BRB No. 10-0295 BLA, slip. op. at 2 n.2.

the administrative law judge erred in giving claimant the benefit of a “non-existent presumption” that his obstructive lung disease was caused by his coal mine employment. Employer’s Brief in Support of Petition for Review at 15. Employer further asserts that the administrative law judge “applied the wrong legal standard,” by requiring employer to “rebut” claimant’s evidence, and that she erred in failing to properly explain why she discredited the opinions of Drs. Dahhan and Jarboe. *Id.* Employer requests that the Board either reverse or vacate the award of benefits and remand the case with instructions that it be reassigned to a different administrative law judge. Neither claimant, nor the Director, Office of Workers’ Compensation Programs, has filed a response brief in this appeal.

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>5</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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203,718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

After consideration of the evidence of record, employer’s brief and the administrative law judge’s Decision and Order on Third Remand, we conclude that the administrative law judge has explained the bases for her findings in accordance with the Administrative Procedure Act,<sup>6</sup> and that substantial evidence supports an award benefits.

In accordance with the Board’s instruction, the administrative law judge reconsidered the medical opinion evidence pursuant to 20 C.F.R. §718.202(a). She noted that Dr. Crater performed the Department of Labor (DOL) evaluation on August 28,

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<sup>5</sup> Because claimant’s last coal mine employment was in Tennessee, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); January 13, 2004 Hearing Transcript at 14.

<sup>6</sup> The Administrative Procedure Act 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 on the record.” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

2001, at which time he noted claimant's symptoms of shortness of breath, a non-productive cough and wheezing. Director's Exhibit 8. Dr. Crater recorded claimant's medical, work and smoking histories, obtained a chest x-ray, conducted a physical examination and objective testing. *Id.* Dr. Crater read the x-ray as positive for pneumoconiosis.<sup>7</sup> *Id.* Based on the results of a pulmonary function test dated March 14, 2002,<sup>8</sup> Dr. Crater stated that claimant has a "severe obstructive ventilatory defect with hyperinflation, air trapping and decreased diffusing capacity consistent with [chronic obstructive pulmonary disease]." *Id.* He indicated the blood gas study was normal. Dr. Crater diagnosed mild emphysema attributable to claimant's "minimal" smoking history and to coal dust exposure. *Id.* Dr. Crater also diagnosed "moderate pneumoconiosis" due to "coal dust/occupational exposure." *Id.*

Dr. Dahhan examined claimant on May 29, 2002, and also reviewed medical records. Employer's Exhibit 1. He reported that claimant worked for thirty-seven years in coal mine employment and smoked one-half a pack of cigarettes a day for twenty years, quitting in 1996. *Id.* Dr. Dahhan read an x-ray as negative for pneumoconiosis. *Id.* He indicated that the pulmonary function testing showed a moderately severe obstructive impairment and a reduction in the diffusion capacity. *Id.* The blood gas study was normal. *Id.* Dr. Dahhan opined that claimant's obstruction was due entirely to smoking, based on the fact that claimant showed a "variable response" to bronchodilator therapy and "significant waxing and waning" of his respiratory impairment. *Id.* According to Dr. Dahhan, a coal dust-related respiratory impairment does not improve or change over time, but rather is a fixed and permanent impairment. *Id.*; *see also* Employer's Exhibit 7.

Dr. Jarboe performed a physical examination and reviewed medical records. Employer's Exhibit 4. He reported a smoking history of one pack a day for thirty years and a coal mine work history of thirty-six years. *Id.* Dr. Jarboe indicated that claimant suffered from moderate obstruction and restriction, based on the pulmonary function tests. *Id.* He diagnosed pulmonary emphysema and moderate airflow obstruction due primarily to cigarette smoking and also to bronchial asthma. *Id.* Dr. Jarboe concluded that claimant's impairment was not caused by coal dust exposure because claimant had "a significant reversible component to the airflow obstruction." *Id.* He also cited to "the

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<sup>7</sup> The administrative law judge noted that Dr. Crater's "diagnosis of clinical pneumoconiosis is undermined by my finding that the x-ray evidence is inconclusive." Decision and Order on Third Remand at 3.

<sup>8</sup> Dr. Crater's initial pulmonary function test was invalidated. Director's Exhibit 8.

absence of evidence of significant dust retention on x-ray.” *Id.*; *see also* Employer’s Exhibit 8.

In resolving the conflict in the evidence, the administrative law judge noted that the Board instructed her to apply the same level of scrutiny to each of the medical opinions. The administrative law judge determined that Dr. Crater’s opinion was reasoned and documented and consistent with the position of the DOL that the effects of smoking and coal dust exposure are additive. In contrast, the administrative law judge determined that the opinions of Drs. Dahhan and Jarboe, that smoking alone caused claimant’s respiratory impairment, were not persuasive.

Contrary to employer’s contention, in accordance with the Board’s remand instruction, the administrative law judge explained that Dr. Crater’s opinion was “supported by the evidence available to him, *including the histories, clinical examination, and objective testing.*” Decision and Order at 18 (emphasis added). She also permissibly concluded that while Dr. Crater described a lesser history of smoking in his report than the administrative law judge determined, “the difference is not so great as to decrease the reliability of his opinion, as it was still a significant history of smoking.”<sup>9</sup> *Id.* The administrative law judge’s inferences with regard to Dr. Crater were reasonable and the fact that other inferences could have been drawn on the facts of this case is immaterial. *See Bizzarri v. Consolidation Coal Co.*, 775 F.2d 751, 753, 8 BLR 2-65 (6th Cir. 1985); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). We therefore hold that the administrative law judge acted within her discretion in finding that Dr. Crater’s opinion was reasoned and documented, based on his qualifications “as a board-certified pulmonologist” and the totality of his examination findings. *Id.*; *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Further, we reject employer’s assertion that Dr. Crater’s opinion was not credible because he did not specifically address why claimant’s impairment could not be due solely to smoking. The administrative law judge rationally found that Dr. Crater’s attribution of claimant’s disabling obstructive respiratory disease to the combination of

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<sup>9</sup> Dr. Crater reported that claimant smoked five to ten cigarettes a day from age twenty-five to sixty-four, which is equivalent to a ten to twenty pack-year history. Director’s Exhibit 8. The administrative law judge complied with the Board’s remand instructions insofar as she concluded that the discrepancy between the history reported by Dr. Crater and her own findings that claimant had a twenty to thirty year pack-year history of smoking did not detract from the credibility of Dr. Crater’s opinion, that claimant has a respiratory condition caused by both smoking and coal dust exposure. Decision and Order at 18.

claimant's ten to twenty year smoking history and his thirty-one years of coal mine employment is sufficient to support a finding that claimant has legal pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(4). Decision and Order at 18; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Gross v. Dominion Coal Corp.*, 23 BLR 1-18 (2003).

With regard to the weight accorded employer's experts, we disagree that the administrative law judge improperly shifted the burden of proof. The administrative law judge observed correctly that because claimant presented a reasoned and documented opinion to establish that he has legal pneumoconiosis, employer was required to introduce credible evidence to dispute Dr. Crater's opinion. *See generally Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). We conclude that the administrative law judge provided valid reasons for finding that the opinions of Drs. Dahhan and Jarboe were not sufficiently reasoned to outweigh Dr. Crater's opinion. The administrative law judge noted correctly that Drs. Dahhan and Jarboe each excluded coal dust exposure as a causative factor for claimant's respiratory disease, in part because he had negative x-ray evidence. Decision and Order at 19-20; Employer's Exhibits 1, 4. The administrative law judge properly noted, however, that the regulations do not require a positive x-ray in order for claimant to establish that he suffers from legal pneumoconiosis. Decision and Order at 19-20; *see* 65 Fed. Reg. 79,971 (Dec. 20, 2000); 20 C.F.R. §718.201(a)(2); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *see also Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). Additionally, the administrative law judge permissibly rejected the opinions of Drs. Dahhan and Jarboe, in part, because they did not explain why the "irreversible component" of claimant's obstruction was not caused by coal dust exposure.<sup>10</sup> Decision and Order at 19; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007).

Furthermore, the administrative law judge noted correctly that Dr. Jarboe believes that emphysema caused by coal dust exposure may be distinguished from emphysema due to smoking. Decision and Order at 20; Employer's Exhibits 4, 8. The administrative law judge permissibly rejected Dr. Jarboe's rationale because she considered it to be contrary to the position of the DOL that "smoking and coal dust cause damage by similar mechanisms." Decision and Order at 20; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Crisp*, 866 F.2d at 185; 12 BLR at 2-129; *Wolf Creek Collieries v. Director, OWCP [Stephens]*,

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<sup>10</sup> The administrative law judge noted that the pulmonary function tests obtained by Drs. Dahhan and Jarboe were qualifying for total disability after the use of a bronchodilator. *See* Decision and Order at 19; Director's Exhibit 14; Employer's Exhibit 4.

298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Groves*, 277 F.3d at 836; 22 BLR at 2-325; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, because the administrative law judge acted within her discretion in rendering her credibility determinations, we affirm her finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

With respect to 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the opinions of Drs. Dahhan and Jarboe are entitled to little weight, relevant to the cause of the miner's total disability, as neither physician diagnosed pneumoconiosis, contrary to the administrative law judge's findings. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 22. For the reasons discussed *supra*, we also affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis, based on Dr. Crater's opinion. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-1-49, 1-155 (1989) (en banc).

We consider employer's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge