

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 15-0322 BLA

WALLACE COFIELD)
)
 Claimant-Respondent)
)
 v.)
)
 CONSOLIDATION COAL COMPANY) DATE ISSUED: 04/15/2016
)
 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 of Thomas M. Burke,
Administrative Law Judge, United States Department of Labor

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

Ashley H. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer.

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2009-BLA-5648) of
Administrative Law Judge Thomas M. Burke awarding benefits a claim filed pursuant to
the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)

(the Act). This case involves a subsequent claim filed on May 9, 2008,¹ and is before the Board for the second time.

In the initial decision, Administrative Law Judge Michael P. Lesniak noted that the parties stipulated that the new evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Judge Lesniak, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309. Consequently, Judge Lesniak considered claimant's 2008 claim on the merits. After crediting claimant with less than fifteen years of coal mine employment,² Judge Lesniak found that the medical opinion evidence did not establish the existence of legal pneumoconiosis.³ However, Judge Lesniak found that the evidence established the existence of clinical pneumoconiosis⁴ pursuant to 20 C.F.R. §718.202(a). Judge Lesniak further found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, Judge Lesniak found that the evidence did not establish that claimant's total disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Lesniak denied benefits.

¹ Claimant's initial claim, filed on November 4, 1987, was denied by the district director on April 6, 1988 for failure to establish any of the elements of entitlement. Director's Exhibit 1.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because Administrative Law Judge Michael P. Lesniak credited claimant with less than fifteen years of coal mine employment, he found that claimant was not entitled to consideration under Section 411(c)(4). Therefore, Judge Lesniak addressed whether claimant satisfied his burden to establish all of the elements of entitlement under 20 C.F.R. Part 718.

³ "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).

⁴ "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).

On appeal, the Board vacated Judge Lesniak's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Cofield v. Consolidation Coal Co.*, BRB Nos. 13-0204 BLA/A (Feb. 25, 2014) (unpub.). In light of this holding, the Board also vacated Judge Lesniak's finding that evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration.

Due to Judge Lesniak's unavailability, on remand the case was reassigned, without objection, to Administrative Law Judge Thomas M. Burke (the administrative law judge). In a Decision and Order on Remand dated May 12, 2015, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the medical opinion evidence established that claimant was totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.⁵ 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 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

⁵ The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge considered the medical opinions of Drs. Rasmussen, Fiehler, Fino, and Basheda.⁶ Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 36; Employer's Exhibit 12 at 34-35. Conversely, Drs. Fiehler, Fino, and Basheda opined that claimant does not suffer from legal pneumoconiosis. Director's Exhibit 12; Employer's Exhibit 3, 5, 8, 13, 14.

The administrative law judge accorded less weight to the opinions of Drs. Fiehler, Fino, and Basheda for the reasons previously set forth by Judge Lesniak. Decision and Order on Remand at 2, 4. However, the administrative law judge found that Dr. Rasmussen's diagnosis of legal pneumoconiosis was well-reasoned and well-documented. *Id.* at 4. The administrative law judge also credited Dr. Rasmussen's opinion because he found that it is consistent with the scientific evidence credited by the DOL in the preamble to the 2001 regulatory revisions. *Id.* at 4. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion to find legal pneumoconiosis.⁷ Employer asserts that Dr. Rasmussen's opinion is not sufficient to satisfy claimant's burden of proof because Dr. Rasmussen's "diagnosis of legal pneumoconiosis [was] based on a speculative possibility, not on facts specific to [claimant's] case." Employer's Brief at 9. Employer's contention has no merit.

⁶ The Board previously affirmed Judge Lesniak's determination to assign little weight to Dr. Celko's opinion that claimant suffers from legal pneumoconiosis. *Cofield v. Consolidation Coal Co.*, BRB Nos. 13-0204 BLA/A, slip op. at 4 n.7 (Feb. 25, 2014) (unpub.).

⁷ Because employer does not challenge the administrative law judge's bases for discrediting the opinions of Drs. Fiehler, Fino, and Basheda regarding the existence of legal pneumoconiosis, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Dr. Rasmussen explained that both coal mine dust and smoking are capable of causing COPD/emphysema, and that the two exposures affect the lungs in “identical ways.” Claimant’s Exhibit 2. Given claimant’s thirteen-year coal mine dust exposure history and his fifty pack-year smoking history, Dr. Rasmussen explained that it is likely that coal mine dust exposure and smoking both played a role in causing claimant’s COPD/emphysema. Employer’s Exhibit 12 at 25, 26, 34. Dr. Rasmussen further explained that claimant suffers from a gas exchange impairment that is more severe than he would expect in the case of a lung disease caused by smoking alone. *Id.* at 25. Dr. Rasmussen opined that both exposures caused claimant’s COPD/emphysema. *Id.* at 30. Because the administrative law judge specifically found that Dr. Rasmussen set forth the rationale for his findings, based on his own interpretation of the medical evidence of record, and explained why he concluded that claimant’s disabling COPD/emphysema is due to both smoking and coal dust exposure, we affirm the administrative law judge’s permissible finding that Dr. Rasmussen’s diagnosis of legal pneumoconiosis is well-reasoned. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-23, 25 BLR 2-255, 2-263 (4th Cir. 2013); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 4.

The administrative law judge also permissibly found that Dr. Rasmussen’s opinion was supported by scientific findings cited in the preamble to the Department of Labor’s amended rulemaking, that smokers who are exposed to coal mine dust have an additive risk for developing significant obstruction. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff’d sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); Decision and Order on Remand at 4. Because it is supported by substantial evidence, the administrative law judge’s finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD/emphysema arising out of coal mine employment, is affirmed.⁸

Employer next argues that the administrative law judge erred in finding that Dr. Rasmussen’s opinion established that claimant’s total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge

⁸ Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found that he was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order on Remand 4.

permissibly found that the analysis employed by Dr. Rasmussen to support his opinion that claimant suffers from legal pneumoconiosis also supported a conclusion that claimant's legal pneumoconiosis had a "material adverse effect" on his pulmonary condition.⁹ Decision and Order on Remand at 4. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁹ Dr. Rasmussen opined that claimant's gas exchange impairment was more severe than would be expected from smoking alone. Employer's Exhibit 12 at 25. Based upon claimant's "marked gas exchange impairment," Dr. Rasmussen opined that claimant's pulmonary impairment was due to both coal mine dust exposure and smoking. *Id.* at 34-35.