

BRB No. 06-0905 BLA

HARVEY FARLEY )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 HEARTLAND COAL COMPANY )  
 )  
 and )  
 )  
 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 on Remand – Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (04-BLA-5095) of Administrative Law Judge Richard A. Morgan rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the

second time and involves a claim filed on October 1, 2002. In his prior Decision and Order, the administrative law judge credited claimant with at least eighteen years of coal mine employment, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, however, determined that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant appealed, and the Board affirmed, as unchallenged by the parties, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b). *Farley v. Heartland Coal Co.*, BRB No. 05-0372 BLA, slip. op. at 2 n.3 (Nov. 22, 2005) (unpub.) (J. Hall, dissenting). The Board rejected claimant's assertion that the Director, Office of Workers' Compensation Programs (the Director), had failed to satisfy his obligation to provide claimant with a complete pulmonary evaluation. *Farley*, slip op. at 6. However, the Board vacated the administrative law judge's finding under Section 718.204(c). The Board specifically held that the administrative law judge did not adequately explain his conclusion that claimant failed to satisfy his burden of proof at Section 718.204(c) because the evidence was insufficient to show that pneumoconiosis was more than "merely a negligible, inconsequential, or insignificant contribution to [his] total disability," *see* Decision and Order at 8. *Farley*, slip op. at 4. The Board specifically directed the administrative law judge to address the impact of Dr. Zaldivar's opinion, that pneumoconiosis made a "small contribution" to claimant's coal dust exposure, and explain how it supported his finding at Section 718.204(c). *Farley*, slip op. at 5; Director's Exhibit 12. The Board also directed the administrative law judge to explain why he found the opinions of Drs. Baker and Gaziano to be "largely unreasoned," *see* Decision and Order at 18. *Farley*, slip op. at 5. The Board, therefore, vacated the administrative law judge's denial of benefits pursuant to Section 718.204(c), and remanded the case for further consideration.

On remand, the administrative law judge, in accordance with the Board's instructions, gave further consideration to the disability causation issue. He noted that Dr. Baker provided a somewhat cursory, but also reasoned opinion, attributing claimant's respiratory disability to both smoking and coal dust exposure, and that Dr. Zaldivar provided a reasoned opinion attributing the vast majority of claimant's impairment to smoking, with a "small contribution" from coal dust exposure. Decision and Order on Remand – Awarding Benefits at 6. Because the administrative law judge considered the opinions of Drs. Baker and Zaldivar to be sufficient to establish that pneumoconiosis was at least a contributing factor to claimant's total disability, the administrative law judge found that claimant had satisfied his burden of proof pursuant to Section 718.204(c). Consequently, the administrative law judge awarded benefits.

Employer appeals, asserting that the administrative law judge erred in construing Dr. Zaldivar's opinion to be supportive of a finding that pneumoconiosis had a material adverse effect on claimant's respiratory disability pursuant to Section 718.204(c). Employer's Brief at 8-9. Employer argues that the plain language of Dr. Zaldivar's opinion establishes that coal dust exposure was insignificant in comparison to cigarette smoking in causing claimant's respiratory impairment. Employer's Brief at 10. Alternatively, employer argues that, at best, Dr. Zaldivar was unclear as to what he meant when he used the term "small contribution" and, therefore, that the administrative law judge improperly relied on Dr. Zaldivar's opinion to award benefits pursuant to Section 718.204(c). *Id.* Claimant responds, urging affirmance of the award of benefits. The Director has declined to file a 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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order on Remand – Awarding Benefits, the briefs of the parties, and the evidence of record, we affirm the administrative law judge's finding at Section 718.204(c) that claimant satisfied his burden of establishing that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment. *See* 20 C.F.R. 718.204(c). As we noted in our prior decision, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, pursuant to 20 C.F.R. §718.204(b) (2000), a miner must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Revised Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially 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). In the comments accompanying the publication of the amended regulations, the Department of Labor indicated that the “substantially contributing cause” standard set forth in 20 C.F.R. §718.204(c) implements the standard developed “in court of appeals precedent since 1989 which varie[s] little from circuit to circuit.” 65 Fed. Reg. 79946 (2000). The Department of Labor also stated that the addition of the word “material” to Section 718.204(c), establishes that “evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability” does not satisfy the standard. *Id.*

Contrary to employer’s contention, the administrative law judge permissibly determined that claimant had satisfied his burden of proof under Section 718.204(c) because the only two physicians of record who addressed the disability causation issue attributed claimant’s total disability, in part, to coal dust exposure. The administrative law judge had discretion to find Dr. Baker’s opinion, that claimant was totally disabled due to a combination of smoking and coal dust exposure, to be reasoned and documented since he found that Dr. Baker had an accurate understanding of both claimant’s smoking and work histories, and the doctor cited to objective evidence to support his conclusions on disability causation.<sup>1</sup> *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 6. Similarly, the administrative law judge permissibly credited Dr. Zaldivar’s opinion. The administrative law judge found Dr. Zaldivar’s opinion to be reasoned and documented, *see Clark*, 12 BLR at 1-155, and the most persuasive as to the etiology of claimant’s respiratory impairment. The administrative law judge stated:

Dr. Zaldivar clearly found that the “vast majority” of the pulmonary impairment is due to smoking. However, Dr. Zaldivar also specified that Claimant’s coal mining work and resultant retention of coal dust in the lungs constituted a “small contribution” to the pulmonary impairment (DX 12). Moreover, Dr. Zaldivar also stated, in pertinent part: “There is a co-existent damage from pneumoconiosis.” (DX 12). Therefore, upon further consideration, in conjunction with the Board’s ruling, I find that Dr. Zaldivar’s opinion buttresses, rather than undermines, Claimant’s position

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<sup>1</sup> The administrative law judge found that “Dr. Gaziano neglected to discuss the role of cigarette smoking [in claimant’s disability] altogether, and failed to specify the extent to which pneumoconiosis contributed to the miner’s impairment.” Decision and Order on Remand – Awarding Benefits at 6. Employer does not challenge the weight accorded the opinions of Drs. Baker and Gaziano pursuant to 20 C.F.R §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

regarding the “causation” issue. Put simply, Dr. Zaldivar’s opinion establishes that, although Claimant’s cigarette smoking is the primary cause of the miner’s disability, the contributing role of pneumoconiosis and/or coal mine dust exposure is not negligible, inconsequential, or insignificant.

Decision and Order on Remand – Awarding Benefits at 5.

We reject employer’s argument that “[t]he only reasonable interpretation of Dr. Zaldivar’s description of a ‘small contribution’ is that it is trivial, insignificant, and limited in degree.” Employer’s Brief at 9. The administrative law judge explained the specific bases for his decision, the weight assigned to the evidence and the relationship he found between the evidence and his legal and factual conclusions under Section 718.204(c). Because the administrative law judge has discretion to weigh the evidence and determine whether a party has met his or her burden of proof, we refuse to disturb the administrative law judge’s determinations on remand as we are not empowered to reweigh the evidence or substitute our inferences for those of the administrative law judge. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge’s finding pursuant to Section 718.204(c). *See Robinson*, 914 F.2d 35, 14 BLR 2-68. Consequently, as claimant has established all of the requisite elements of entitlement, *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge’s award of benefits as supported by substantial evidence.

Accordingly the administrative law judge’s Decision and Order on Remand - Awarding Benefits 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