U.S. Department of Labor

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

BRB No. 14-0368 BLA

HUBERT KEENE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
DAVIS & WHITED COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/25/2015
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefit of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Worker's Compensation Programs (the Director), appeals the Decision and Order - Denying Benefits (13-BLA-5005) of Administrative Law Judge Alan L. Bergstrom rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). In a Decision and Order dated June 20, 2014, the administrative law judge credited claimant with 14 years and 6.4 months of coal mine employment, and adjudicated this claim, filed on October 26, 2011, pursuant to the regulatory provisions at 20 C.F.R. Part 718.[1] The administrative law judge found that the evidence was sufficient to establish the existence of legal pneumoconiosis[2] arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish disability causation at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, the Director contends that the administrative law judge erred in concluding that claimant failed to establish disability causation at Section 718.204(c). Thus, the Director submits that the denial of benefits should be reversed and that benefits should be awarded to claimant. Employer/carrier (employer) responds, urging affirmance of the denial of benefits. Alternatively, employer challenges the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a). In a reply brief, the Director disputes employer's contentions. Claimant is not participating in this appeal.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Because claimant established less than 15 years of coal mine employment, the administrative law judge determined that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Decision and Order at 23.

[2] "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of coal mine employment and his finding that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 6 at 4-5. Accordingly, the Board will apply the law 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).

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 in a living miner's claim under 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is caused by pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

I. Legal Pneumoconiosis

Employer challenges the administrative law judge's weighing of the medical opinions of record in finding the existence of legal pneumoconiosis established pursuant to Section 718.202(a).[5] The administrative law judge considered the medical opinions of Drs. Splan, Fino and McSharry. Dr. Splan diagnosed chronic bronchitis and chronic obstructive pulmonary disease (COPD), and attributed both conditions to cigarette smoking and coal mine dust exposure. He specified that claimant's severe disabling ventilatory impairment was "entirely related to his COPD," and concluded that claimant had "statutory pneumoconiosis." Director's Exhibit 10; Decision and Order at 28-29; *see* 20 C.F.R. §718.201(a)(2). Dr. Fino also diagnosed chronic bronchitis and severe COPD, but attributed the conditions solely to cigarette smoking. Employer's Exhibits 1, 5. Dr. McSharry diagnosed a severe obstruction "most consistent" with cigarette smoking-induced emphysema rather than pneumoconiosis. Employer's Exhibit 2. Drs. Fino and McSharry opined that claimant's coal mine dust exposure did not contribute to his obstructive lung disease. *Id.* at 1, 2, 5; Decision and Order at 30-33.

In evaluating the opinion of Dr. Fino, that claimant's COPD was due to smoking, the administrative law judge determined that the physician appeared to rely on an inaccurate coal dust exposure history, as Dr. Fino noted that although claimant had reported 15 years of coal mine employment, it was his understanding that claimant had been credited with only 7 years. Dr. Fino then indicated that a history of less than 10 years of coal mine employment was unlikely to produce a chronic obstruction due to

[5] Although not raised in a cross-appeal, we will address employer's contention that the administrative law judge erred in finding the existence of legal pneumoconiosis established, as it is supportive of the administrative law judge's decision denying benefits. 20 C.F.R §802.212(b); Director's Reply Brief at 1 n.1.

emphysema or chronic bronchitis.[6] Employer's Exhibit 1 at 7, 10. However, as the administrative law judge found more than 14 years of underground coal mine employment, he permissibly discounted Dr. Fino's opinion to the extent that it was based upon an incorrect assumption. Decision and Order at 31; *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

The administrative law judge also considered Dr. Fino's observations that smoking is more harmful than coal dust exposure, and that claimant's smoking history was much more significant than his coal mine employment history. The administrative law judge noted that these observations could support a finding that smoking played a greater role in claimant's disease process, but that Dr. Fino did not explain how and why he concluded that coal dust exposure played "no role" in claimant's disease.[7] Decision and Order at 31; Employer's Exhibit 1 at 10. Consequently, the administrative law judge permissibly found that Dr. Fino's opinion was entitled to "low probative weight," as the physician failed to "point to any objective evidence or explain why he ruled out the possibility that coal mine dust exposure may have contributed to [c]laimant's lung disease." Decision and Order at 31; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

Similarly, the administrative law judge found that Dr. McSharry failed to acknowledge that coal mine dust exposure can contribute to obstructive lung disease, and failed to identify the objective criteria that led him to rule out claimant's coal mine dust exposure as a potential contributing factor in his severe obstructive lung disease. Decision and Order at 33. As a result, the administrative law judge permissibly determined that Dr. McSharry's opinion, that claimant's respiratory impairment was entirely due to smoking, was "not fully reasoned," and merited "reduced probative weight." *Id.*; *see Clark*, 12 BLR at 1-155. Contrary to employer's argument, the administrative law judge did not shift the burden of proof to employer, but determined

[6] Dr. Fino posited that less than 10 years of coal dust exposure could produce a coal dust-related silicosis that would be clearly seen on x-ray, and only in the case of a miner working as a driller or rod cutter. Employer's Exhibit 1 at 9-10.

[7] Dr. Fino stated that "both smoking and coal mine dust are cumulative diseases" and that "[claimant's] work in the mines pales in comparison to his smoking history." He opined that "clearly smoking is medically reasonable [to account for claimant's disabling obstruction] because of his long history of smoking. Coal dust inhalation is not medically reasonable as a significant contributing factor in his obstruction." Employer's Exhibit 1 at 9-10.

that Dr. McSharry's reasoning was inconsistent with scientific studies found credible in the preamble to the Department's rulemaking which defined legal pneumoconiosis. Therefore, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and McSharry.[8] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *see also J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

We also reject employer's contention that the administrative law judge erred in finding that Dr. Splan's opinion was well-reasoned and sufficient to support a finding of legal pneumoconiosis. Employer's Brief at 17-18, 22; Decision and Order at 9-10, 28-30, 33. The administrative law judge determined that Dr. Splan based his diagnosis of statutory pneumoconiosis on accurate coal mine employment and smoking histories, medical history, physical examination, and clinical testing results from x-rays, a pulmonary function study, a resting blood gas study, and a pulmonary stress test. Director's Exhibit 10; Decision and Order at 29. Finding that Dr. Splan "clearly explained" his diagnoses of chronic bronchitis and COPD due to both coal dust and smoking, the administrative law judge determined that Dr. Splan's opinion was consistent with the underlying documentation in this case and the definition of legal pneumoconiosis, and that the physician "accounted for the effects of claimant's significant smoking history." *Id*. Thus, the administrative law judge found that Dr. Splan provided a reasoned diagnosis of legal pneumoconiosis, and that the "contrary opinions of Drs. Fino and McSharry are less reasoned and are outweighed by Dr. Splan's opinion." *Id*. at 34; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Based on the credible evidence of record, the administrative law judge determined that claimant suffers from legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); Decision and Order at 26, 33-34. As substantial evidence supports the administrative law judge's credibility determinations, we affirm the administrative law judge's finding that the weight of the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that all of the evidence of record, when weighed together, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 34; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR at 2-162, 2-169 (4th Cir. 2000).

[8] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Fino and McSharry, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Fino and McSharry.

II. DISABILITY CAUSATION

The Director contends that the administrative law judge erred in finding that Dr. Splan's opinion failed to establish disability causation at Section 718.204(c),[9] stating:

> Given that Dr. Splan found that the claimant's COPD is legal pneumoconiosis, his opinion that claimant's disability is due entirely or primarily to his COPD is necessarily sufficient to establish the disability causation element. Simply put, if a miner has totally disabling COPD, and that COPD is adjudged to be legal pneumoconiosis, the miner must prevail.

Director's Reply at 4. Thus, the Director asserts that, in the absence of any credited contrary evidence, Dr. Splan's opinion establishes disability causation at Section 718.204(c), which requires only that pneumoconiosis make "more than a negligible, inconsequential or insignificant contribution to disability." Decision and Order at 34; Director's Brief at 3 n.3, 6-7. Employer, citing *Arch On The Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014), responds that the administrative law judge correctly found that disability causation was not established,[10] because pneumoconiosis must be a "substantially contributing cause" of claimant's impairment, and "at no time did [Dr. Splan] state that [claimant's] pneumoconiosis was totally disabling in itself or that it was the primary cause of [claimant's] disability." Employer's Brief at 12-13. The Director replies that the "substantially contributing cause" standard cited by the Sixth

[9] Employer's assertion that the Director, Office of Workers' Compensation Programs [the Director] "has no standing to challenge" the administrative law judge's credibility findings regarding Dr. Splan's medical opinion is meritless. Employer's Brief at 16. As the Board stated in its order denying employer's "Motion to Dismiss and Suspend Briefing," as a party-in-interest in all claims under the Black Lung Benefits Act, the Director has standing to ensure the proper enforcement and lawful administration of the Black Lung program, and thus may appeal a decision and allege that the administrative law judge committed errors in his consideration of the claim. 30 U.S.C. §932(k); 20 C.F.R. §725.360(a)(5); *Keene v. Davis & Whited Coal Co., Inc.*, BRB No. 14-368 BLA (Jan. 8, 2015)(unpub. Order); Director's Reply at 5-6; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994).

[10] The administrative law judge rationally discounted the disability causation opinions of Drs. Fino and McSharry because the physicians did not diagnose the existence of legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 40. As this finding is uncontested, it is affirmed. *Skrack*, 6 BLR at 1-711.

Circuit in *Groves* pertains to cases involving multiple pulmonary diseases, and is inapplicable here, since this claimant "suffers from only one pulmonary disease, COPD arising from dust exposure."[11] Director's Reply at 5. Hence, the Director avers, "the [administrative law judge] ignored the plain language of Dr. Splan's opinion, which attributes [claimant's] disability 'primarily' or 'entirely' to dust related COPD." *Id.* at 7; Director's Brief at 4. The Director reasons that, because "[Dr. Splan] diagnosed COPD due to smoking and coal dust exposure -- a diagnosis that constitutes 'legal' pneumoconiosis -- and stated that the COPD totally disabled [claimant]," his opinion "is legally sufficient to establish total disability causation." Director's Brief at 8; *see also* Director's Reply at 5. Consequently, the Director argues, "Dr. Splan's opinion shows that this condition was the 'entire' or 'primary' cause of claimant's disability - far more than a 'de minimis' cause and plainly sufficient under any reasonable interpretation of the regulatory standard." Director's Reply at 5.

We agree with the Director's argument that, while the administrative law judge articulated the proper standard for establishing disability causation at Section 718.204(c), he applied the wrong standard in his analysis of Dr. Splan's opinion. Significantly, the administrative law judge found that:

> Dr. Splan offered a documented and reasoned opinion that [c]laimant's respiratory impairment was entirely attributable to COPD arising out of both cigarette smoking and coal mine dust inhalation. This necessarily implies that the impairment was partly attributable to legal pneumoconiosis (because COPD arising out of coal mine dust inhalation constitutes legal pneumoconiosis).

Decision and Order at 40-41. Despite this finding, the administrative law judge determined that claimant failed to establish that his total respiratory disability was due to pneumoconiosis because Dr. Splan "did not discuss to what extent [c]laimant's respiratory impairment was attributable to coal mine dust exposure as opposed to tobacco smoke inhalation, and did not opine that [c]laimant's history of coal mine dust exposure substantially or materially contributed to his [disabling] respiratory impairment." *Id.* at 39-40. The administrative law judge concluded that Dr. Splan's opinion "as stated, is insufficient to establish that [c]laimant's pneumoconiosis was a substantially contributing cause of his total respiratory disability, as required by 20 C.F.R. §718.204(c)(1)." Decision and Order at 41. The administrative law judge applied the wrong standard, however, in his analysis of whether Dr. Splan's opinion meets claimant's burden on the issue of disability causation. Instead of focusing on the contribution which

[11] The administrative law judge recognized that "Dr. Splan diagnosed COPD and chronic bronchitis," and opined that both diseases were due to coal dust and tobacco smoke inhalation. Decision and Order at 29, 39; Director's Reply at 5.

pneumoconiosis makes to claimant's total respiratory disability at Section 718.204(c)(1), the administrative law judge revisited the question of the extent to which claimant's respiratory impairment is attributable to *coal mine dust exposure*,[12] which is the relevant

[12] The administrative law judge's confusion is understandable, as the questions posed in determining the existence of legal pneumoconiosis and disability causation are similar, but not identical.

The definition of legal pneumoconiosis, set forth at 20 C.F.R. §718.201(a)(2), (b) is:

> . . . any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment . . . For purposes of this section, 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(a)(2), (b).

The definition of total disability due to pneumoconiosis (disability causation), set forth at 20 C.F.R. §718.204(c)(1), is:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in [20 C.F.R.] §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).

Consequently, the proper place for the inquiry regarding the contribution of *coal dust exposure* is in the determination as to the existence of legal pneumoconiosis. We

inquiry in establishing the existence of legal pneumoconiosis at Section 718.201(a)(2).[13] Decision and Order at 40. This was error. Having determined that legal pneumoconiosis was established, the administrative law judge should have considered whether that condition is a "substantially contributing cause" of claimant's disability.

Notwithstanding the administrative law judge's error in the application of an incorrect legal standard, the facts of this case do not mandate a remand for application of the correct standard. While factual determinations are the province of the administrative law judge, in this case "no factual issues remain to be determined" and "[n]o further factual development is necessary." *See generally Collins v. Pond Creek Mining Co*., 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014)(denial reversed with directions to award benefits without further administrative proceedings). The very findings essential to our consideration have been rendered by the administrative law judge and affirmed by the Board as rational and supported by the record. *See Dempsey v. Sewell Coal Co*., 23 BLR 1-47 (2004)(en banc). The administrative law judge determined that Dr. Splan's opinion, that claimant's total respiratory disability was entirely attributable to COPD arising out of a combination of coal mine dust inhalation and tobacco use, was reasoned and documented, as it comported with the underlying symptoms, spirometry, examination results, arterial blood gas studies and treatment records.[14] Decision and Order at 29, 39-

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have upheld the administrative law judge's determination of the existence of legal pneumoconiosis, and we note that Dr. Splan himself diagnosed "statutory pneumoconiosis." No party has argued to us that the administrative law judge's finding with respect to the adequacy of Dr. Splan's opinion on disability causation requires that the administrative law judge revisit his determination as to the establishment of legal pneumoconiosis. Therefore, we will not address that question.

[13] The Director correctly notes that a physician need not apportion a precise percentage of a miner's lung disease to cigarette smoke versus coal dust exposure in order to establish the existence of legal pneumoconiosis. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763-64, 21 BLR 2-587, 2-605-06 (4th Cir. 1999); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). However, the administrative law judge must find from the evidence that the chronic lung disease is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b); *see Arch On The Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014).

[14] The administrative law judge's findings were somewhat confusing, as he based his finding of legal pneumoconiosis on Dr. Splan's diagnosis of statutory pneumoconiosis, Decision and Order at 29, and confirmed that, in this case, there was COPD arising out of coal mine dust inhalation which constituted legal pneumoconiosis, Decision and Order at 41, but he appears also to have considered the diagnosis of COPD

41. Thus, the administrative law judge found that Dr. Splan's opinion was wholly credible on the issues of legal pneumoconiosis and disability causation, and he discredited all evidence to the contrary. It is undisputed that claimant is disabled by COPD; the administrative law judge determined that Dr. Splan's attribution of claimant's COPD to both smoking and coal dust exposure constituted legal pneumoconiosis and was fully creditable; and the administrative law judge discredited all opinions to the contrary and there is no other contrary evidence. Thus, Dr. Splan's opinion establishes disability causation at Section 718.204(c). Director's Brief at 8; *see also* Director's Reply at 5. Consequently, we agree with the Director that the facts of this case warrant reversal of the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part and reversed in part, and this case is remanded for entry of an award of benefits.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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as a separate condition in his disability causation analysis (". . . [c]laimant suffers from severe obstructive lung disease and from pneumoconiosis arising out of coal mine employment"), Decision and Order at 39.