

U.S. Department of Labor

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



BRB No. 15-0447 BLA

WILLIAM R. POST)	
)	
Claimant-Respondent)	
)	
v.)	
)	
JAGRTI COAL COMPANY, INCORPORATED)	DATE ISSUED: 08/25/2016
)	
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05559) of Administrative Law Judge Richard A. Morgan 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). This case involves a claim filed on October 20, 2010.

The administrative law judge credited claimant with 13.62 years of underground coal mine employment and, therefore, found that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).¹ Addressing whether claimant could establish entitlement under 20 C.F.R. Part 718, without the assistance of the Section 411(c)(4) presumption, the administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.203. The administrative law judge further found that the evidence established that claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.²

¹ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment are established 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

² We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has 13.62 years of coal mine employment, and that the evidence is sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.³ 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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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).

We first address employer's challenge to the administrative law judge's finding that claimant established the existence of legal pneumoconiosis,⁴ at 20 C.F.R. §718.202(a)(4). Employer's Brief at 13-19. Initially, employer contends that the administrative law judge relied on an inaccurate smoking history in evaluating the credibility of the medical opinions. *Id.* at 15. Specifically, employer contends that the administrative law judge's determination that claimant has at least a 9.7 pack-year smoking history is "contrary to [claimant's medical treatment records which are] the more credible and objective evidence of record." *Id.* Employer's arguments lack merit.

In rendering a finding as to the length and extent of claimant's smoking history, the administrative law judge considered the smoking histories contained in the medical opinions and medical treatment records, together with claimant's hearing testimony.⁵

³ Because the record indicates that the miner's last coal mine employment was in West Virginia, 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); Director's Exhibit 4.

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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁵ The administrative law judge found that Dr. Forehand, in his 2014 report, stated that claimant reported that he smoked from 1979 through 2006, by which time he was

Decision and Order 5-6. Contrary to employer's contention, having found that the evidence concerning claimant's smoking history is "inconsistent and conflicting," and that "there is no clear range or estimate," the administrative law judge permissibly relied on claimant's hearing testimony, taken "under oath," to conclude that claimant smoked at least 9.7 pack-years. *See Doss v. Itmann Coal Co.*, 53 F. 3d 654, 19 BLR 2-181 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 5; Employer's Brief at 15. The administrative law judge noted that the miner testified to smoking "about 9.7 pack-years: forty-one years of smoking 1/5 pack per day, plus one year of smoking a pack per day, plus three years of smoking [two] cigarettes per month." Decision and Order at 5. The length and extent of claimant's smoking history is a factual, not medical, determination committed to the administrative law judge's discretion. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Further, the credibility of witnesses and the weight to be accorded the hearing testimony are within the discretion of the administrative law judge. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Because the record reflects that the administrative law judge considered the complete range of claimant's reported smoking histories, and permissibly relied on

only smoking four cigarettes per day. Decision and Order at 6; Claimant's Exhibit 1. However, because claimant's carboxyhemoglobin test results showed that claimant was likely still smoking at the time of the 2014 examination, Dr. Forehand considered claimant to have a thirty-five year smoking history. Decision and Order at 13; Claimant's Exhibit 1. The administrative law judge found that Dr. Porterfield, in his 2012 report, stated that claimant had a smoking history of one-third pack per day for thirty years. Decision and Order at 5, 11; Director's Exhibit 12. The administrative law judge found that, in his 2014 report, Dr. Zaldivar recorded a smoking history of around 13 years, noting that claimant reported smoking from his 50's, around 1995, to 2008. Decision and Order at 5-6, 11; Employer's Exhibit 1. However, Dr. Zaldivar further opined that claimant was still smoking up to one-half pack per day, based on his carboxyhemoglobin results. Decision and Order at 5-6, 11; Employer's Exhibit 1. The treatment records, dating between 2006 and 2013, include notations of claimant smoking between one pack per day and two packs per day, with one 2010 treatment record noting that claimant recently cut down to one pack per day. Employer's Exhibits 2, 3. Finally, the administrative law judge considered claimant's testimony that he began smoking in 1969, smoked about two to four cigarettes per day (or one-tenth to one-fifth pack per day), except for a one-year period after he quit the mines when he smoked about a pack per day, and that he continues to smoke two or three cigarettes per month. Decision and Order at 5; Hearing Transcript at 17-18.

claimant's sworn testimony to determine that claimant has at least a 9.7 pack-year smoking history, the administrative law judge's finding is affirmed. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Clark*, 12 BLR at 1-155; Decision and Order at 5.

We next address employer's argument 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). Relevant to the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Forehand, Porterfield, and Zaldivar. Dr. Forehand, who examined claimant and reviewed the medical opinions of record, diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to the combined effects of coal mine dust exposure and smoking. Claimant's Exhibits 1, 3. Dr. Porterfield, who administered the Department of Labor (DOL) examination, also diagnosed legal pneumoconiosis, in the form of mild to moderate COPD due to coal mine dust exposure and cigarette smoking. Director's Exhibit 12. In contrast, based on a physical examination of claimant and review of additional evidence, Dr. Zaldivar opined that the claimant does not suffer from legal pneumoconiosis, but suffers from undiagnosed asthma and cigarette smoke-induced COPD/emphysema, that are not related to claimant's coal mine dust exposure. Employer's Exhibits 1, 4.

In weighing the conflicting evidence, the administrative law judge found that Dr. Forehand's opinion that claimant has legal pneumoconiosis is well reasoned and well documented, and entitled to full probative weight. Decision and Order at 23-24. The administrative law judge found that Dr. Porterfield's opinion that claimant has legal pneumoconiosis is also well documented, but accorded it "slightly less weight" because the physician did not adequately explain his conclusions. Decision and Order at 22. Conversely, the administrative law judge found that the opinion of Dr. Zaldivar, that claimant does not suffer from legal pneumoconiosis, is not well reasoned and is inadequately explained. *Id.* at 23. According the greatest weight to the opinion of Dr. Forehand, as supported by the opinion of Dr. Porterfield, 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). *Id.* at 24.

Employer asserts that the administrative law judge erred in his consideration of the opinion of Dr. Zaldivar. Employer contends that Dr. Zaldivar's opinion, that claimant's obstructive impairment is due to smoking, is the best reasoned and best documented, and is supported by claimant's heavy smoking history, as reflected in claimant's medical treatment records. Employer's Brief at 17-19. We disagree that the administrative law judge impermissibly gave less weight to the opinion of Dr. Zaldivar. Initially, as we have

affirmed the administrative law judge's finding that claimant has at least a 9.7 pack-year smoking history, there is no merit to employer's contention that Dr. Zaldivar's reliance on a longer smoking history rendered his opinion the most credible.⁶ Moreover, although employer accurately notes that Dr. Zaldivar opined that other conditions, *i.e.*, undiagnosed asthma and COPD/emphysema due to smoking, could account for claimant's respiratory impairment, Employer's Brief at 17-19, the administrative law judge permissibly accorded less weight to Dr. Zaldivar's opinion on the ground that he did not adequately explain why claimant's 13.62 years of coal dust exposure did not contribute, along with these other factors, to his impairment. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order at 23.

Employer further contends that the administrative law judge erred in relying on the opinions of Drs. Forehand and Porterfield to support a finding of legal pneumoconiosis. Employer generally asserts that the opinions of Drs. Forehand and Porterfield are not sufficiently reasoned. Employer's Brief at 13-14, 16-19. We disagree. In crediting the opinions of Dr. Forehand and, to a lesser extent, Dr. Porterfield, the administrative law judge noted that both physicians based their diagnoses of legal pneumoconiosis on claimant's coal mine employment and smoking histories, a medical history, a physical examination, and the results of objective testing. Decision and Order at 22-23; Claimant's Exhibits 1, 3; Director's Exhibit 12. The administrative law judge further found that, in concluding that claimant's COPD is due to the combined effects of smoking and coal mine dust, Dr. Forehand acknowledged that claimant had a lengthy smoking history, but also explained how he considered that claimant worked at the face of the mine, with inadequate ventilation, and did not wear a respirator. *Id.* Further, the administrative law judge noted that Dr. Forehand had supported his conclusions with references to medical studies that he stated demonstrated that smoking and coal mine dust exposure have additive effects on ventilatory function. Decision and Order at 13, 23; Claimant's Exhibit 1. The administrative law judge, therefore, found that Dr. Forehand's diagnosis of legal pneumoconiosis was well reasoned and well documented. *Id.* The administrative law judge further found that Dr. Porterfield's opinion, while not well explained, was nonetheless well documented and supportive of Dr. Forehand's opinion. Decision and Order at 22-23.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for

⁶ Further, as employer concedes, both Drs. Forehand and Zaldivar considered that claimant may have a greater smoking history than he testified to, and both agreed that he was still smoking at the time of their examinations in 2014. Employer's Brief at 15.

their diagnoses, and assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013) (Traxler, C.J., dissenting); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Employer's arguments are essentially a request for a reweighing of the evidence, which the Board is not empowered to do. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Anderson*, 12 BLR at 1-113. We therefore affirm the administrative law judge's determination to credit Dr. Forehand's opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 24. Further, contrary to employer's contention, because Dr. Forehand specifically opined that claimant's respiratory impairment "arose to a substantial degree" from his coal mine dust exposure, we affirm the administrative law judge's conclusion that Dr. Forehand's opinion is sufficient to satisfy claimant's burden of proof. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-8, 22 BLR 2-564, 2-571 (4th Cir. 2002); Claimant's Exhibit 1 at 3. We, therefore, affirm the administrative law judge's finding that the opinion of Dr. Forehand, as supported by the opinion of Dr. Porterfield, is sufficient to establish the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also found 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). *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-346 (4th Cir. 2006); *Compton*, 211 F.3d at 212, 22 BLR at 2-176; Decision and Order at 24. Because it is supported by substantial evidence, this finding is affirmed.⁷

Next, employer generally argues that the administrative law judge erred in finding that claimant's pneumoconiosis is a "substantially contributing cause" of his disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 17-20. Contrary to employer's contention, the administrative law judge reasonably determined that the same reasons he provided for discrediting the opinion of Dr. Zaldivar on the issue of legal pneumoconiosis also undercut his opinion that claimant's disabling obstructive impairment is unrelated to pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70,

⁷ 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 at 24.

2-83 (4th Cir. 1995); Decision and Order at 31. Further, the administrative law judge permissibly credited Dr. Forehand's opinion, that claimant's coal mine dust-induced lung disease is "a substantially contributing cause" of his totally disabling obstructive impairment, as reasoned and persuasive, and sufficient to meet claimant's burden of proof. *See* 20 C.F.R. §718.204(c); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 31. As employer makes no other argument regarding the administrative law judge's disability causation finding, we affirm the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge