

BRB No. 11-0344 BLA

CARL HICKS)
)
 Claimant-Petitioner)
)
 v.)
)
 MAGIC MINING, INCORPORATED)
)
 and) DATE ISSUED: 12/21/2011
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Harlan, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (05-BLA-5588) of Administrative Law Judge Janice K. Bullard denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves a subsequent claim filed on

January 20, 2004, and is before the Board for the third time.¹ When this case was most recently before the Board, pursuant to employer's appeal, the Board vacated the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and remanded the case for her to reconsider the conflicting readings of a March 9, 2004 x-ray. Further, the Board instructed the administrative law judge to address whether the medical opinion evidence established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the Board instructed the administrative law judge that, before evaluating the medical opinions on the existence of legal pneumoconiosis, she must make a specific finding as to the extent of claimant's smoking history. Because the Board vacated the administrative law judge's finding of pneumoconiosis, it also vacated her finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instructed her to reconsider that issue, if necessary.²

On remand, the administrative law judge credited claimant with twenty-one years of coal mine employment,³ and found that claimant had a thirty pack-year smoking history. The administrative law judge further found, after reconsidering the interpretations of claimant's March 9, 2004 x-ray, that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Finally, the administrative law judge found that the medical opinion evidence did not

¹ The procedural history of this case is detailed in the Board's last decision. *Hicks v. Magic Mining, Inc.*, BRB Nos. 09-0539 BLA and 09-0539 BLA-S, slip op. at 2-4 (July 22, 2010) (unpub.). Additionally, the Board noted that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the claim in this case because it was filed before January 1, 2005. *Hicks*, slip op. at 4.

² The Board affirmed the administrative law judge's finding that the current claim is a subsequent claim, and held that, because claimant established that he is totally disabled, he established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). Further, in remanding the case, the Board instructed the administrative law judge that if she again awarded benefits on remand, she was to consider whether the hourly rate that claimant's counsel requested in his fee petition was a reasonable hourly rate, and that she address employer's objections to the amount of time that claimant's counsel billed for specific services. *Hicks*, slip op. at 7-8, 15.

³ The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 9, 10. Accordingly, 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*).

establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that claimant had a thirty pack-year smoking history. Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁴

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living 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 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*).

Claimant's Smoking History

Claimant initially argues that the administrative law judge's finding regarding the extent of claimant's smoking history fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).⁵ We disagree. Contrary to claimant's contention, after considering the conflicting evidence, the

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ Under the terms of the Administrative Procedure Act, each adjudicatory decision must include a statement of "the findings and conclusions, and the reasons or basis therefor, on all 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 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

administrative law judge specifically explained her reasons for finding that claimant had a smoking history of thirty pack-years.

On remand, the administrative law judge considered the conflicting smoking histories listed in the claimant's medical reports and treatment records. Decision and Order on Remand at 3-4. The administrative law judge accurately noted that claimant testified that he began smoking when he was thirty years of age, and continued to smoke approximately one-half a pack of cigarettes a day for the next twenty-five to thirty years. Hearing Tr. at 14-15. The administrative law judge also noted that the smoking histories recorded by Drs. Baker, Potter, Rosenberg, and Jarboe ranged from a pack a day for eight to ten years to one-half pack a day for fifty years. Director's Exhibit 19 at 16, 100. The administrative law judge noted that claimant's treatment records also contained "varying smoking histories." Decision and Order on Remand at 4. A 2005 consultation report indicated that claimant began smoking at the age of five and smoked one pack a day for many years, while a 2005 discharge summary indicated that claimant continued to "smoke up to 2 packs of cigarettes a day." Employer's Exhibit 12. After considering all of the conflicting evidence, the administrative law judge found that claimant's smoking history was more extensive than that described by claimant:

The record varies on the amount [c]laimant smoked and at what age he started. While some evidence reflects that [c]laimant started smoking at age 5, I am extremely hesitant to make such an extreme finding. However, there is enough evidence in the treatment records that indicate[s] a smoking habit greater than the 1/2 pack a day that [c]laimant testified to and reported to certain physicians. I find that [c]laimant has a smoking history of 30 years at one pack of cigarettes per day. This finding represents the general time frame that [c]laimant testified to and reported to most doctors; however, my finding also takes into account the fact that several different treatment records indicate that [c]laimant smoked anywhere from 1 to 2 packs of cigarettes a day. Accordingly, [c]laimant is credited with 30 pack years.

Decision and Order on Remand at 4.

Contrary to claimant's contention, the administrative law judge's determination comports with the requirements of the APA, as she considered all of the relevant evidence, and provided a sufficient explanation for her determination that claimant smoked, on average, one pack of cigarettes a day for thirty years. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). We, therefore, affirm the administrative law judge's finding that claimant had a thirty pack-year smoking history.

Legal Pneumoconiosis

Claimant next argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis⁶ pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge, on remand, reconsidered the conflicting opinions of Drs. Baker, Potter, Rosenberg, and Jarboe. Dr. Baker diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. Director's Exhibits 17, 40. Dr. Potter also diagnosed legal pneumoconiosis, in the form of a restrictive lung disease due to coal mine dust exposure. Director's Exhibit 19; Claimant's Exhibit 4. Although Drs. Rosenberg and Jarboe also diagnosed emphysema/COPD, they opined that the disease was due solely to cigarette smoking. Employer's Exhibits 3, 6.

In her consideration of the conflicting evidence, the administrative law judge found that Dr. Baker's opinion, that claimant's COPD was due to both cigarette smoking and coal mine dust exposure, was entitled to less weight, because Dr. Baker relied upon an inaccurate smoking history. Decision and Order on Remand at 11. The administrative law judge accorded less weight to Dr. Potter's opinion because she found that the doctor failed to identify the smoking history upon which he relied. *Id.* The administrative law judge also found that Dr. Potter's opinion was not well-reasoned. *Id.* Additionally, the administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Jarboe because they also did not rely upon accurate smoking histories. *Id.* The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant argues that the administrative law judge erred in discrediting Dr. Baker's opinion. We disagree. The administrative law judge discredited Dr. Baker's opinion regarding the etiology of claimant's COPD because the doctor did not base his opinion upon an accurate smoking history.⁷ Decision and Order on Remand at 11. An administrative law judge may properly discredit the opinion of a physician which is based upon an inaccurate or incomplete picture of the miner's health. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988).

⁶ "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).

⁷ Dr. Baker opined that claimant's fifteen pack-year smoking history was "sort of borderline in the degree of cigarette smoking felt to be necessary to cause any lung problems." Claimant's Exhibit 3 at 5-6.

Claimant also argues that the administrative law judge erred in according less weight to Dr. Potter's opinion because she found that it was not well-reasoned. We disagree. The issue of whether a medical report is adequately reasoned and documented is committed to the discretion of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge permissibly found that Dr. Potter's diagnosis of legal pneumoconiosis was not well-reasoned, noting that the doctor did not clearly indicate the smoking history upon which he relied,⁸ and failed to address the effect of the miner's smoking on his lung disease.

Because the opinions of Drs. Baker and Potter are the only opinions supportive of a finding that claimant suffers from legal pneumoconiosis, we affirm the administrative law judge'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).

Because the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

⁸ Dr. Potter provided his diagnosis of legal pneumoconiosis on a one-page questionnaire. Although the questionnaire indicates that claimant "has a smoking history of 1/2 ppd since age 30," Dr. Potter did not indicate the length of claimant's smoking history upon which he relied. Claimant's Exhibit 4. The administrative law judge noted that Dr. Potter's treatment records "contain smoking histories ranging from a 1/2 pack a day all the way up to 75 pack years." Decision and Order on Remand at 11; Director's Exhibit 19.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge