BRB No. 13-0098 BLA

ELIZABETH BERRY (Widow of DAMON L. BERRY) Claimant-Respondent v. PEABODY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/20/2013 DECISION and ORDER

Appeal of the Decision and Order on Remand Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Maia S. Fisher (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2008-BLA-05260) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed

on June 16, 2004, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] This claim is before the Board for a second time. In its prior Decision and Order, the Board affirmed the administrative law judge's acceptance of the parties' stipulation to twenty-seven years of coal mine employment and his findings that claimant established the existence of clinical pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), 718.204(b)(2). *Berry v. Peabody Coal Co.*, BRB No. 11-0373 BLA, slip op. at 2 n.2, 7 (Feb. 21, 2012). The Board vacated, however, the administrative law judge's finding that claimant[2] established total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c) and the award of benefits. *Id.* at 9. The Board remanded the case to the administrative law judge with instructions to make initially a finding at 20 C.F.R. §718.202(a)(4), as to whether claimant has established the existence of legal pneumoconiosis and then reconsider whether claimant established total disability causation at 20 C.F.R. §718.204(c). *Id*. at 9-10. After reconsidering the evidence on remand, the administrative law judge found that the evidence was sufficient to satisfy claimant's burden of proof at 20 C.F.R. §§718.202(a)(4) and 718.204(c), and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis and that he is totally disabled due to legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, asserting that the administrative law judge properly relied on the preamble to the 2001 regulations in assessing the credibility of the medical opinions in this case. Employer has filed a reply brief, reiterating its arguments on 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 rational, supported by substantial evidence and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the

[1] The amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30U.S.C. §921(c)(4), and revived Section 422(l) of the Act, 30 U.S.C. §932(*l*). The amendments do not apply to this claim, as it was filed before January 1, 2005.

[2] Claimant is the widow of the miner, Damon L. Berry, who died on October 27, 2010, while his claim was pending before the administrative law judge. She is pursuing this claim on the miner's behalf.

[3] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Legal Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Baker, Houser, Repsher, and Fino. Dr. Baker examined the miner on July 16, 2004, at the request of the Department of Labor, and noted a smoking history of two to three packs of cigarettes per day from 1955 to 1987, and an ongoing pipe smoking habit that began in 1987. Director's Exhibit 9. Dr. Baker diagnosed legal pneumoconiosis[4] in the form of chronic obstructive pulmonary disease (COPD), caused by coal dust exposure and smoking. *Id*. In a supplemental report, Dr. Baker stated, "[the miner] has a long history of coal dust exposure. He had an even greater history of cigarette smoking and while that is the greater exposure, the [thirty-one] years of coal dust exposure is a significant exposure as well. I feel that it has been a significant contributing factor and substantially aggravating factor to his pulmonary condition." Director's Exhibit 30.

Dr. Houser's opinion reflects that he reviewed the miner's medical records and diagnosed totally disabling COPD/emphysema. Claimant's Exhibit 2. Dr. Houser indicated that the miner had smoked two to three packs per day for thirty-two years and, when asked at his deposition whether the miner's long-term cigarette smoking could account for all his respiratory abnormalities, Dr. Houser stated:

> If you had a risk factor for smoking and a risk factor for dust exposure, you would generally assume that if you added those together, a cumulative risk factor, that would be the risk. . . . [T]hese studies show that the risk factor is synergistic, that it's worse than either factor alone. And that would tend to imply that you cannot then start reaching conclusions that the dust was not a factor and it was only due to smoking.
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> . . . . [I]n an individual case it's impossible to measure the relative contribution of two or more factors which each independently can cause it.

States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "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(b).

Employer's Exhibit 3 at 40-41.

In his opinion, Dr. Repsher states that he examined the miner on November 9, 2004, and concluded, based on the results of the examination, that the miner was not suffering from clinical or legal pneumoconiosis. Director's Exhibit 17. Dr. Repsher determined that the miner's pulmonary function studies showed "pure COPD, which is characteristic of cigarette smoking related COPD, but is most atypical for [coal workers' pneumoconiosis]." *Id*.

Finally, Dr. Fino's opinion shows that he reviewed the miner's medical records and concluded that the miner did not have clinical pneumoconiosis, but suffered from a totally disabling impairment caused by bullous emphysema. Employer's Exhibit 2. Citing medical literature in support of his conclusion, Dr. Fino found that the miner's emphysema was due entirely to his smoking. *Id*.

The administrative law judge determined that the opinions of Drs. Repsher and Fino were entitled to little weight, as neither physician provided an adequate rationale for his conclusion that coal dust exposure played no role in the miner's disabling respiratory impairment. Decision and Order on Remand at 4-6. In contrast, the administrative law judge determined that Dr. Houser's diagnosis of legal pneumoconiosis was well-reasoned, consistent with the regulations, and supported by Dr. Baker's opinion. *Id*. at 6-7. Accordingly, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(2). *Id*. at 7.

Employer argues that the administrative law judge erred in referring to the preamble to the regulation defining legal pneumoconiosis, when weighing the medical opinion evidence. Employer contends that an administrative law judge may refer to the agency's comments regarding a regulation only when the language of the regulation is ambiguous which, employer alleges, is not the case here. Employer also asserts that the preamble cannot supply the reasoning missing from a doctor's opinion and that, although Drs. Houser and Baker discussed the "possible" synergistic effects of smoking and coal dust exposure, neither cited to any objective medical testing to support their opinions or explained how the testing showed that coal dust exposure contributed to the miner's COPD. In addition, employer maintains that Drs. Baker and Houser did not adequately address the miner's smoking and occupational histories, and that Dr. Houser's opinion is based on a significantly understated smoking history.

Employer further alleges that the administrative law judge erred in discrediting the opinions of Drs. Repsher and Fino, as he improperly applied a higher degree of scrutiny to their opinions than to the opinions of Drs. Baker and Houser. In support of this allegation, employer asserts that it was irrational for the administrative law judge to discredit the opinions of Drs. Repsher and Fino because they failed to explain how they

distinguished between the effects of smoking and coal dust exposure, while crediting the opinions of Drs. Baker and Houser, who stated that they were unable to distinguish between the effects of these causal agents. Employer further alleges that, as a consequence of the administrative law judge's use of unequal levels of scrutiny, the burden of persuasion was improperly shifted to employer.

Employer's allegations of error are without merit. Regarding the administrative law judge's reliance upon the preamble to discredit the opinions of Drs. Repsher and Fino, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has acknowledged that the preamble sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). The court further held that the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12. The court concluded, therefore, that an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *Id*. Accordingly, the administrative law judge permissibly found that the opinions of Drs. Repsher and Fino were entitled to diminished weight because they indicated, contrary to the DOL's comments in the preamble, that coal mine dust does not cause clinically significant obstructive lung disease in the absence of clinical pneumoconiosis.[5] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-151 (6th Cir. 2012).

Moreover, the administrative law judge acted within his discretion as fact-finder in giving great weight to Dr. Houser's diagnosis of legal pneumoconiosis, as Dr. Houser: "discussed the epidemiologic literature that establishes that coal mine [dust] exposure causes significant obstructive airways impairment;" "effectively rebutted the opinions of Drs. Repsher and Fino;" "considered individual factors indicating that coal mining contributed to [the miner's] obstructive lung disease;" and "fairly considered [the miner's] condition and provided a reasoned explanation for his conclusions." Decision and Order on Remand at 6-7; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-

[5] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In addition, contrary to employer's allegation, Dr. Houser did not merely note a thirty-two year smoking history. Rather, Dr. Houser indicated that the information he reviewed reflected that the miner smoked between two and three packs of cigarettes per day from 1955 to 1987. Claimant's Exhibit 2 at 1.

The administrative law judge also rationally credited Dr. Baker's opinion, although finding that it was not as comprehensive as Dr. Houser's opinion, because Dr. Baker's diagnosis of legal pneumoconiosis was supported by the results of the pulmonary evaluation, including reported symptoms of daily dyspnea, productive cough for six to eight years and wheezes, work history, current breathing medication, chest x-ray, abnormal pulmonary function tests showing a moderate breathing defect and moderate resting hypoxemia. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-547; *Cornett*, 227 F.3d at 576, 22 BLR at 2-120. Finally, contrary to employer's contention, the administrative law judge acted within his discretion in according weight to the opinions of Drs. Houser and Baker, despite the fact that they did not apportion the relative contributions of smoking and coal dust exposure to the miner's COPD. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997). We affirm, therefore, the administrative law judge's finding that Dr. Houser's opinion, as supported by Dr. Baker's opinion, was entitled to greater weight than the contrary opinions of Drs. Repsher and Fino, and was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

II. Total Disability Causation

In considering the issue of total disability causation, the administrative law judge initially noted that "the Board determined that Dr. Repsher's opinion on causation could be excluded because his opinion that [the miner's] impairment was not totally disabling is contrary to the record." Decision and Order on Remand at 8. With respect to Dr. Fino's opinion, the administrative law judge gave it little weight because he did not diagnose either clinical or legal pneumoconiosis, and the medical literature he cited predated the 2001 revisions to the definition of pneumoconiosis. *Id*. In contrast, the administrative law judge gave great weight to Dr. Houser's opinion identifying coal dust exposure as a substantially contributing cause of the miner's totally disabling obstructive impairment, as he "provide[d] the most thorough and persuasive explanation," "discusse[d] all of the objective data and provide[d] an articulate analysis of the causation issue in support of his conclusion." *Id*. The administrative law judge further determined that Dr. Baker's opinion, that seventy-five percent of the miner's totally disabling obstructive impairment was attributable to smoking, while the remaining twenty-five percent was attributable to coal dust exposure, was entitled to some weight. *Id*. at 8-9. Based upon these findings,

the administrative law judge concluded that claimant established that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 9.

Employer argues that the administrative law judge erred in applying a *de minimis* standard to the issue of total disability causation and, consequently, erred in determining that claimant met her burden of proof under 20 C.F.R. §718.204(c). Employer also contends that the administrative law judge erred in discrediting Dr. Fino's opinion.

Employer's allegations are without merit. The administrative law judge's observation that Dr. Houser provided the most compelling explanation of why the miner's COPD was "a substantially contributing cause" of his totally disabling impairment establishes that he applied the correct standard.[6] Decision and Order on Remand at 8. Moreover, the administrative law judge rationally found that the opinions of Drs. Baker and Houser, that the miner was totally disabled due to his COPD, which was caused by both smoking and coal dust exposure, satisfied the applicable standard. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2004) (a medical opinion that pneumoconiosis "was one of two causes" of total disability meets the "substantially contributing cause" standard at 20 C.F.R. §718.204(c)). In addition, the administrative law judge acted within his discretion in according less weight to Dr. Fino's opinion, that the miner's totally disabling impairment was due entirely to smoking, even assuming that legal pneumoconiosis was present, on the ground that Dr. Fino relied on scientific literature that was developed prior to the regulatory definition of legal pneumoconiosis adopted in 2001.[7] *See Adams*, 694 F.3d at 802, 25 BLR at 2-211; *Banks*, 690 F.3d at 489,

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[6] The regulation at 20 C.F.R. §718.204(c)(1) provides:

> 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:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
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> (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).

[7] The Department of Labor indicated in the preamble to the 2001 revisions to the definition of pneumoconiosis that Dr. Fino's views regarding whether coal dust exposure

25 BLR at 2-151. Thus, we affirm the administrative law judge's finding that claimant established total disability causation pursuant to 20 C.F.R. §718.204(c), based on Dr. Houser's opinion, and we further affirm the award of benefits under 20 C.F.R. Part 718.

III. Date of Onset

The administrative law judge awarded benefits effective June 1, 2004 – the first day of the month in which the miner filed his claim, based upon his crediting of "Dr. Baker's report of June 16, 2004," in which the physician diagnosed moderate restrictive and obstructive impairments that "were competent to produce total disability." Decision and Order on Remand at 9-10; *see* Director's Exhibit 9. Employer argues that the administrative law judge's onset determination cannot be affirmed, as Dr. Baker relied on an invalid pulmonary function study to find the miner totally disabled and the administrative law judge "undertook no effort to identify the date of total disability due to pneumoconiosis." Employer's Brief in Support of Petition for Review at 21.

We reject employer's allegation that Dr. Baker's pulmonary function study was not valid, as employer was required to raise any allegation regarding the validity of this study before the administrative law judge, but did not do so.[8] *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Orek v. Director, OWCP*, 10 BLR 1-51 (1987). Because employer raises no other challenge to the administrative law judge's determination that Dr. Baker's report established that the miner was totally disabled due to pneumoconiosis as of the date of that report, we affirm the administrative law judge's finding. However, because the administrative law judge misidentified the date of Dr. Baker's pulmonary function study and report as June 16, 2004, rather than July 16, 2004, we modify the administrative law judge's date of onset determination to July 1, 2004.

IV. Attorney Fee Petition

Claimant's counsel has filed an itemized statement requesting fees for services performed before the Board from February 14, 2011 to February 28, 2012 in BRB No.

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can cause clinically significant obstructive lung disease "are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).

[8] Additionally, in our prior Decision and Order, we affirmed, as unchallenged on appeal, the administrative law judge's finding that the studies obtained by Drs. Baker and Repsher produced qualifying values that supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Berry v. Peabody Coal Co.*, BRB No. 11-0373 BLA, slip op. at 2 n.2, 7 (Feb. 21, 2012).

11-0373 BLA, which involved employer's prior appeal of the administrative law judge's initial award of benefits in the miner's claim, and from May 26, 2011 to July 20, 2012 in BRB No. 11-0603 BLA, which involved employer's appeal of the administrative law judge's award of attorney fees. Counsel requests fees of $2,352.00 for 9.80 hours of legal services at an hourly rate of $240.00 in BRB No. 11-0373 BLA, and $3,552.00 for 14.80 hours of legal services at an hourly rate of $240.00 in BRB No. 11-0603 BLA.

Employer objects to the fee petitions, arguing that counsel improperly engaged in "block-billing," i.e., identifying the total number of hours spent preparing response briefs in each case and the dates between which the services were performed. Employer's Opposition to Shifted Fees at 1. Employer specifically challenges counsel's request for compensation for 8.50 hours of services performed between April 26, 2011 and May 2, 2011, and 13 hours of services performed between August 29, 2011 and September 1, 2011. Employer requests that the Board strike these 21.50 hours, unless claimant's counsel provides specific details regarding which tasks she performed and when she performed them. In response, claimant's counsel asserts that the services are not block-billed, as the time spent preparing the response brief was one activity performed over the course of three days.

Although counsel's method of preparing her fee petitions was not ideal, the entries identify with sufficient detail both the tasks performed in conjunction with preparing response briefs and the amount of time spent performing them. *See* 20 C.F.R. §802.203(c). We further hold that the services for which counsel seeks compensation were necessary to the proper conduct of the case and that the time expended on such services was reasonable. 20 C.F.R. §802.203(e); *see B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Therefore, the attorney fees are awarded as requested.

Accordingly, the administrative law judge's Decision and Order Awarding benefits is affirmed, as modified to reflect July 1, 2004, as the date from which benefits commence, and counsel is awarded award a fee of $5,904.00, representing 24.6 hours of legal services at an hourly rate of $240.00, to be paid directly to claimant's counsel by employer.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge