

BRB No. 11-0417 BLA

DAVID R. HARLAN)
)
 Claimant-Respondent)
)
 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 02/15/2012
)
 Employer-Petitioner)
)
 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 Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5842)
of Administrative Law Judge Joseph E. Kane rendered 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).¹ In a Decision and Order dated February 15, 2011, the

¹ In an April 7, 2010 Order, the administrative law judge provided the parties with
notice of the recent amendment to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),
and allowed the parties to address its potential applicability to this case. Claimant,
employer, and the Director, Office of Workers' Compensation Programs, each submitted

administrative law judge credited claimant with 13.37 years of coal mine employment² and found that the medical opinion evidence established that claimant suffers from legal pneumoconiosis,³ in the form of chronic obstructive pulmonary disease (COPD) that was significantly related to, or substantially aggravated by, coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant is totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b), and that legal pneumoconiosis is a substantially contributing cause of claimant's total disability, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's evaluation of the medical opinions in finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c). Employer further challenges the administrative law judge's weighing of the medical opinions in light of the scientific views endorsed by the Department of Labor (DOL) in the preamble to the revised regulations. Employer urges the Board to vacate the award of benefits and direct reassignment of this case to a different administrative law judge on remand. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer filed a reply brief, reiterating its contentions on appeal. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.⁴

briefs in response, agreeing that, although the amendment applies to claimant's claim based on its filing date, the amendment does not affect the adjudication of the claim, because claimant has not established at least fifteen years of coal mine employment.

² The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 4, 6. 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*).

³ 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).

⁴ The administrative law judge's finding of 13.37 years of coal mine employment, and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), are affirmed as unchallenged on appeal. *See Coen*

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *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).

Legal Pneumoconiosis

Employer contends 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). The administrative law judge considered the medical opinions of Drs. Rasmussen, Simpao, Houser, Repsher, and Fino. Drs. Rasmussen, Simpao, and Houser opined that claimant suffers from COPD due, at least in part, to coal mine dust exposure.⁵ 20 C.F.R. §718.201(a)(2); Claimant's Exhibits 6, 11; Director's Exhibit 12. Drs. Repsher and Fino opined that claimant's coal mine dust exposure did not contribute to his COPD.⁶ Employer's Exhibits 2, 3; Director's Exhibit 14.

The administrative law judge accorded no probative weight to the opinions of Drs. Repsher and Fino, because he found them to be inadequately explained and based on

v. Director, OWCP, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD) and emphysema due to a combination of coal mine dust exposure, non-coal mine employment-related exposure to welding fumes, fly ash and asbestos, and smoking. Claimant's Exhibit 11. Dr. Simpao opined that claimant's COPD is due to both coal mine dust exposure and smoking. Director's Exhibit 12. Dr. Houser opined that claimant's COPD is due to coal mine dust exposure and non-coal mine employment-related exposure to welding fumes, fly ash, and asbestos. Claimant's Exhibit 6.

⁶ Dr. Repsher diagnosed severe COPD, causally related to cigarette smoking. Director's Exhibit 14. Dr. Fino diagnosed a disabling obstructive respiratory impairment, due solely to cigarette smoking. Employer's Exhibits 2, 3.

premises contrary to the findings of DOL, as set forth in the preamble to the revised regulations, regarding obstructive lung disease and coal mine dust exposure. Decision and Order at 19-22. Conversely, the administrative law judge credited Dr. Rasmussen's opinion, diagnosing legal pneumoconiosis, because he found Dr. Rasmussen's explanation to be supported by extensive documentation and consistent with DOL's findings as to the prevailing medical literature regarding the probability of developing a coal mine dust-related impairment, independent of clinical pneumoconiosis.⁷ The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Initially, we reject employer's assertion that the administrative law judge erred in referring to the preamble to the amended regulations when weighing the medical opinions relevant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 17-21. In evaluating the expert opinions of record in conjunction with DOL's discussion of the medical science cited in the preamble to the amended regulations, the administrative law judge did not improperly treat the preamble as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis. Employer's Brief at 17-18, 20-21. Contrary to employer's assertion, it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles accepted by DOL, and to consider the preamble to the revised regulations in assessing the credibility of the medical experts' opinions in this case. *See J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Lewis Coal Co. v. Director, OWCP [McCoy]*, 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004).

We also reject employer's contention that the administrative law judge erred in determining that Dr. Rasmussen's opinion was sufficient to establish the existence of legal pneumoconiosis, under 20 C.F.R. §718.202(a)(4). Dr. Rasmussen considered claimant's symptoms, his medical, smoking and employment histories, his x-rays and objective studies, and the medical reports prepared by Drs. Simpao, Houser, Repsher, and Fino. Claimant's Exhibit 11. The administrative law judge permissibly found that Dr. Rasmussen's opportunity to review most of the evidence of record, and his substantial

⁷ The administrative law judge stated that he did not rely on the opinions of Drs. Simpao and Houser, diagnosing legal pneumoconiosis, because, while their opinions are consistent with Dr. Rasmussen's opinion, Dr. Simpao has no special qualifications, and Dr. Houser did not account for claimant's smoking history as a possible cause of his COPD. Decision and Order at 22. Therefore, we need not address employer's contentions regarding the credibility of their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

experience with coal workers' pneumoconiosis, bolstered Dr. Rasmussen's opinion. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 22. The administrative law judge also found that Dr. Rasmussen attributed claimant's impairment to both smoking and coal mine dust exposure, based on claimant's thirteen years of coal mine employment and his "significant" smoking history of at least sixty years. Decision and Order at 12, 19; Claimant's Exhibit 11 at 2. As noted by the administrative law judge, although Dr. Rasmussen acknowledged that claimant's thirteen years of coal mine employment played a lesser role in causing his impairment than did his extensive smoking history, he explained that thirteen years of coal mine dust exposure was sufficient to rise to a "significant level of co-contribution" in a susceptible individual, and he further explained that claimant is a susceptible individual. Decision and Order at 12, 22; Claimant's Exhibit 11 at 2-4. Further, as the administrative law judge noted, Dr. Rasmussen specifically refuted the contrary opinions of Drs. Repsher and Fino, and explained why the lack of radiographic evidence of pneumoconiosis in no way diminished the probability that coal mine dust contributed to claimant's impairment. Decision and Order at 13, 22; Claimant's Exhibit 11 at 3.

Contrary to employer's arguments, having specifically considered these aspects of Dr. Rasmussen's opinion, the administrative law judge permissibly credited Dr. Rasmussen's opinion as consistent with the scientific premises underlying the regulations that coal mine dust can cause chronic airflow limitation independently of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. Nov. 29, 2007)(unpub.); *Obush*, 24 BLR at 1-125-26; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 21-22; Claimant's Exhibit 11. Consequently, we affirm the administrative law judge's determination to credit Dr. Rasmussen's diagnosis of legal pneumoconiosis, as adequately explained and consistent with the views accepted by DOL when it revised the definition of legal pneumoconiosis, as the administrative law judge's credibility determination is supported by substantial evidence. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

We further reject employer's contention that the administrative law judge erred in discrediting the medical opinions of Drs. Repsher and Fino. Dr. Repsher opined that "the average loss of FEV1 is so small, that it is not detectable in an individual miner," and that, therefore, "in this individual coal miner, to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma." Director's Exhibit 14 at 3-4. The administrative law judge assigned less weight to the opinion of Dr. Repsher, in part, because while Dr. Repsher acknowledged that coal mine dust can

cause COPD, his opinion was contrary to DOL's recognition that coal mine dust-induced COPD is clinically significant and is not merely rare. *See* 65 Fed. Reg. at 79,939; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987); Decision and Order at 20-21; Employer's Brief at 22; Director's Exhibit 14 at 3-4. An administrative law judge may discredit a medical opinion he finds to be divergent from the prevailing view of the medical community and scientific literature relied upon by DOL in promulgating the revised regulations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). Thus, the administrative law judge permissibly concluded that Dr. Repsher did not provide an adequate explanation for his conclusion, that cigarette smoking was the sole cause of claimant's COPD. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; Decision and Order 21.

With regard to Dr. Fino's opinion, the administrative law judge noted that, in explaining the basis for his determination that claimant does not have legal pneumoconiosis, Dr. Fino appeared to conflate the concepts of clinical pneumoconiosis with legal pneumoconiosis when he cited with approval studies indicating that "the amount of clinical pneumoconiosis in the lungs determines the amount of emphysema." Decision and Order at 21, *quoting* Employer's Exhibit 2 at 9. The administrative law judge rationally interpreted Dr. Fino's reliance on these studies as an indication that he ruled out coal mine dust exposure as a cause of claimant's impairment based, in part, on his view that the presence of legal pneumoconiosis is tied to the degree of clinical pneumoconiosis that is present. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26; Decision and Order on Remand at 8-9; Employer's Exhibits 5, 8, 12, 13, 18. The administrative law judge further found that Dr. Fino did not adequately explain how he eliminated claimant's thirteen years of coal mine dust exposure as a contributing or aggravating factor in claimant's COPD. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Decision and Order at 21. Thus, the administrative law judge acted within his discretion in discounting Dr. Fino's opinion, as contrary to the views accepted by DOL, and inadequately explained. Decision and Order at 17; 65 Fed. Reg. at 79,940; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Obush*, 24 BLR at 1-125-26.

Finally, we reject employer's assertion that the administrative law judge gave disparate treatment to the opinions of Drs. Rasmussen, Repsher, and Fino. Employer's Brief at 15, 23. As discussed above, the administrative law judge examined the documentation and reasoning of each physician's opinion, and permissibly credited Dr. Rasmussen's opinion as better explained and more consistent with prevailing view of the medical community and scientific literature relied upon by DOL in promulgating the revised regulations. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We, therefore, affirm

the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total Disability Due to Legal Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Repsher and Fino, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. See *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom. Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 27; Employer's Brief at 23-25. The fact that Dr. Fino stated that his opinion would remain the same, even if he were to assume the existence of "coal workers' pneumoconiosis," does not compensate for Dr. Fino's opinion that claimant does not have legal pneumoconiosis as found by the administrative law judge, namely, COPD due, in part, to coal mine dust exposure. See *Skukan*, 993 F.2d at 1233, 17 BLR at 2-104; Employer's Brief at 23; Employer's Exhibit 3. Moreover, as the administrative law judge rationally relied on the opinion of Dr. Rasmussen to find that claimant established the existence of legal pneumoconiosis, in the form of disabling COPD that is significantly related to, or substantially aggravated by, coal mine dust exposure, he permissibly found that Dr. Rasmussen's opinion supported a finding that legal pneumoconiosis is a "substantially contributing cause" of claimant's total disability, pursuant to 20 C.F.R. §718.204(c). See *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 303 (6th Cir. 2001); Decision and Order at 27-28. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). We, therefore, affirm the administrative law judge's award of benefits. Thus, we reject, as moot, employer's request that, if remanded, this case be reassigned to another administrative law judge. Employer's Brief at 25-27.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge