

BRB No. 08-0308 BLA

M.A.)
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 Claimant-Respondent)
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 v.)
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 JONES FORK OPERATION) DATE ISSUED: 01/16/2009
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 and)
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 CONSOL ENERGY, INCORPORATED)
)
 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 on Remand - Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Allison B. Moreman (Jackson & Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2004-BLA-05528) of Administrative Law Judge Joseph E. Kane (the administrative law judge) on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge determined that claimant established that the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer contends that in discrediting the opinions of Drs. Rosenberg and Repsher on remand, the administrative law judge shifted the burden to employer to disprove the existence of legal pneumoconiosis and that claimant's total disability was due to legal pneumoconiosis. Employer also argues that the administrative law judge erred in crediting Dr. Baker's opinion at Sections 718.202(a)(4) and 718.204(c). Employer further contends that the administrative law judge mischaracterized Drs. Repsher and Rosenberg's opinions and failed to adequately consider their opinions on the issue of disability causation.

Claimant responds urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has issued a limited response, arguing that employer's disability causation analysis is based upon a misinterpretation of the law of the United States Court of Appeals for the Fourth Circuit and that under the law of the Sixth Circuit, within whose jurisdiction this case arises,¹ the administrative law judge rationally discounted the opinions of Drs. Rosenberg and Repsher because they did not diagnosis pneumoconiosis.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C.

¹ Because the miner worked in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

² We affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 10.

§921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Rosenberg, Repsher, and Baker. Dr. Rosenberg examined claimant on February 16, 2004 and obtained a chest x-ray, a pulmonary function study, and a blood gas study. Employer’s Exhibit 3. Dr. Rosenberg diagnosed chronic obstructive pulmonary disease (COPD) and reported “without the presence of complicated disease, and for that matter any micronodularity, [claimant’s] disabling COPD has not been caused or hastened by the past inhalation of coal mine dust exposure.” *Id.* At his deposition, Dr. Rosenberg stated:

When one looks at [the FEV1/FVC ratio] in relationship to coal dust exposure in various groups of coal miners, and there’s been various epidemiologic studies that have looked at that . . . All those three different populations of workers looked at this ratio of FEV1 [percent] in relationship to coal dust exposure. Bottom line is that while in some of the studies a minimal decrease occurred even after - this is at a period of time when there was high-intensity exposure to coal dust before 1969 - the most his value was reduced was 2 or so or 3 percent. While that may be statistically significant, that doesn’t translate into the kind of chronic obstructive pulmonary disease [claimant] has. His FEV1 percent is down 25 percent. So he has major league obstructive lung disease with a bronchodilator response, which is not characteristic at all of the coal dust obstruction that one sees with coal miners.

Employer’s Exhibit 8 at 22.

Dr. Repsher examined claimant on January 22, 2004 and obtained a chest x-ray, a pulmonary function study, and a resting blood gas study. Employer’s Exhibit 2. Dr. Repsher concluded that claimant did not have coal workers’ pneumoconiosis or any other dust-related lung disease based upon claimant’s negative chest x-ray, the purely obstructive defect revealed on claimant’s pulmonary function study, and claimant’s normal blood gas study. *Id.* Dr. Repsher diagnosed COPD and attributed it to cigarette smoking. *Id.* At a deposition obtained on March 13, 2004, Dr. Repsher explained why he would not identify coal dust exposure as a cause of claimant’s COPD, stating that the medical literature shows that:

The decrement of FEV1 on the average is so small that it is not discernible on the testing in an individual. It is only discernible by comparing a large number of dust-exposed coal miners with an

equally large number of non-dust-exposed workers in a different industry ... And, therefore, since you can't measure these changes, they would not be clinically significant because they would not be – since they are not measurable, they would not be accompanied by any measurable impairment or disability.

Employer's Exhibit 10 at 15-16. Dr. Repsher also indicated that he would not attribute obstructive lung disease to coal dust exposure unless there was a sufficient history of coal mine employment and no evidence of asthma or a smoking-related disease. Employer's Exhibit 10 at 26, 29-30.

Dr. Baker examined claimant on January 15, 2003 and obtained a chest x-ray, a pulmonary function study, and a resting blood gas study. Director's Exhibit 14. Dr. Baker diagnosed COPD caused by smoking and coal dust exposure. At a deposition taken on February 3, 2005, Dr. Baker reiterated his conclusions. Claimant's Exhibit 6.

In considering the medical opinions, the administrative law judge concluded that Dr. Rosenberg's opinion was entitled to diminished weight because Dr. Rosenberg relied upon a premise contrary to the position of the Department of Labor (DOL) that coal dust exposure can cause a significant decrease in a miner's FEV1/FVC ratio. Decision and Order on Remand at 4. The administrative law judge also determined that Dr. Rosenberg did not adequately explain the significance of the reversibility of claimant's impairment. *Id.* at 4-5. The administrative law judge discredited Dr. Repsher's opinion "because it virtually forecloses the possibility that a particular miner's COPD could ever be attributable to coal dust exposure." *Id.* at 8. With respect to Dr. Baker's opinion, the administrative law judge stated, "I continue to find Dr. Baker's opinion better reasoned and better documented and, therefore, more persuasive." *Id.* at 9. Based upon these findings, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Id.*

Employer contends that the administrative law judge erred in implying that Dr. Rosenberg relied solely upon the large decrease in claimant's FEV1/FVC ratio to rule out coal dust exposure as a cause of claimant's obstructive impairment. Employer also argues that the administrative law judge erred in finding that Dr. Rosenberg misstated the results of the Attfield and Hodous study, which the DOL referenced in drafting the amended definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Employer further alleges that the administrative law judge's characterization of Dr. Repsher's opinion is inaccurate and that the physician based his findings on specific objective data that the administrative law judge overlooked. Lastly, employer maintains that the administrative law judge

erred in finding Dr. Baker's diagnosis of legal pneumoconiosis to be well reasoned and well documented.

These allegations of error are without merit. With respect to Dr. Rosenberg's opinion, the administrative law judge rationally concluded that:

Although establishing disability under 20 C.F.R. §718.204 does not establish pneumoconiosis, it would not have made sense for the Department to permit miners to use a decreased FEV1/FVC to establish total disability if, as Dr. Rosenberg believes, a substantially decreased FEV1/FVC rules *out* pneumoconiosis.

Decision and Order on Remand at 4 (emphasis in original). Furthermore, as noted by the administrative law judge, "in comments to [Section] 718.201, the Department cites with approval studies that report that coal dust exposure does result in decreased FEV1/FVC values." *Id.*; see 65 Fed. Reg. 79940, 79943 (Dec. 20, 2000). Thus, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Rosenberg was entitled to less weight because he relied on a faulty premise that "contradicts legislative fact." Decision and Order on Remand at 4; see *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) (It is proper to discount a doctor's opinion based on medical science which DOL has determined is not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature). The administrative law judge also acted rationally in discrediting Dr. Rosenberg's opinion because he did not provide an adequate rationale for his conclusions that reversibility is inconsistent with a coal dust-related lung disease and that coal dust exposure played no role in causing claimant's fixed impairment. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); Decision and Order on Remand at 5. We affirm, therefore, the administrative law judge's determination that Dr. Rosenberg's opinion was entitled to diminished weight under Section 718.202(a)(4).

Regarding Dr. Repsher's opinion, contrary to employer's allegation of error, the administrative law judge noted that Dr. Repsher acknowledged that coal dust exposure could cause an obstructive impairment. Decision and Order on Remand at 8. The administrative law judge indicated correctly, however, that it was Dr. Repsher's opinion that a coal dust-related decrement in pulmonary function can only be measured by aggregating a large sample of miners and that obstruction cannot be attributed to coal dust inhalation unless every other cause has been ruled out. *Id.* The administrative law judge rationally concluded, therefore, that Dr. Repsher's opinion was entitled to diminished weight, as he relied upon a view of the extent to which coal dust exposure causes obstructive

lung disease that is contrary to the view accepted by DOL. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); Decision and Order on Remand at 8. As noted by the administrative law judge, in promulgating the revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), DOL reviewed the medical literature on this issue and found that there was a consensus among medical experts that coal dust-induced COPD is clinically significant and that the causal relationship between coal dust and COPD is not merely rare. Decision and Order at 8 n. 4; 65 Fed. Reg. 79,938 (Dec. 20, 2000). Accordingly, we affirm the administrative law judge's decision to give little weight to Dr. Repsher's opinion at Section 718.202(a)(4).

With respect to Dr. Baker's opinion, in his prior Decision and Order, the administrative law judge determined that Dr. Baker provided a reasoned and documented diagnosis of legal pneumoconiosis and found that his opinion was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). 2005 Decision and Order at 9. Employer argued on appeal that the administrative law judge erred in crediting Dr. Baker's opinion. The Board rejected employer's allegations of error, holding that:

[T]he administrative law judge was not required to reject Dr. Baker's opinion diagnosing the existence of legal pneumoconiosis as inconsistent because the doctor failed to definitively diagnose an occupational lung disease due to coal dust exposure in his initial report, while diagnosing it in a subsequent report, as it was within the administrative law judge's discretion to consider Dr. Baker's findings as a whole, and credit his more recent positive diagnosis of chronic obstructive pulmonary disease due to smoking and coal dust exposure. Moreover, we find no merit in employer's assertion that Dr. Baker's opinion is equivocal because the doctor opined that he could not distinguish between the effects of coal dust exposure and cigarette smoking on claimant's totally disabling lung disease, as Dr. Baker opined that the effects of claimant's smoking and his coal dust exposure were equally part of claimant's condition. Likewise, the administrative law judge did not err by finding that Dr. Baker's opinion was supported by the medical literature, rather than crediting Dr. Repsher's opinion that Dr. Baker misinterpreted the medical literature. We also reject employer's argument that the administrative law judge failed to consider the qualifications of employer's physicians as the administrative law judge noted that Drs. Repsher, Rosenberg and Baker were all pulmonary specialists.

[M.A.] v. *Jones Fork Operation*, BRB No. 06-0260 BLA (Oct. 31, 2006), slip op. at 4, citations omitted. In the present appeal, employer reiterates the arguments that the Board previously rejected. Because employer has not identified any meritorious arguments in support of altering the Board's prior disposition of these issues, the Board's holdings now constitute the law-of-the-case and will not be disturbed. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We affirm, therefore, the administrative law judge's weighing of Dr. Baker's opinion and his determination that it was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to 718.204(c), employer cites Fourth Circuit case law in support of its position that, because Drs. Rosenberg and Repsher diagnosed a totally disabling obstructive impairment, the administrative law judge could not properly discredit their opinions on causation merely because they did not diagnose pneumoconiosis. The Director urges the Board to reject employer's contention, as this case arises within the jurisdiction of the Sixth Circuit. The Director also asserts, "the Sixth Circuit has held that it is proper for an administrative law judge to discount a physician's negative opinion on disability causation where that opinion is based on the erroneous assumption that the miner does not have pneumoconiosis." Director's Brief at 2. The Director also maintains that even if the Fourth Circuit precedent is applicable, the court has held that for a physician's opinion on disability causation to be credible, the physician must diagnose some condition related to coal dust exposure. Therefore, the Director contends that if the Board affirms the administrative law judge's legal pneumoconiosis finding, his disability causation finding must also be affirmed.

In addressing Section 718.204(c), the administrative law judge found that employer's position regarding disability causation was "an attempt to re-argue that dust exposure did not cause claimant's COPD, which has already been resolved." Decision and Order on Remand at 10. The administrative law judge also cited *Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002) (*en banc*), in support of the proposition that an administrative law judge can accord less weight to an opinion regarding causation when it is based on an incorrect premise regarding the presence or absence of pneumoconiosis. *Id.* Accordingly, the administrative law judge gave little weight to the opinions of Drs. Rosenberg and Repsher, and gave greater weight to Dr. Baker's opinion that claimant's disability is due to claimant's coal induced COPD. *Id.*

We affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis under Section 718.204(c), as it is rational and supported by substantial evidence. In determining that claimant proved that he is suffering from legal pneumoconiosis pursuant to Section 718.202(a)(4), the

administrative law judge rationally found that the opinions in which Drs. Rosenberg and Repsher stated that claimant's totally disabling obstructive impairment was not related to coal dust exposure were entitled to little weight.

See slip op. at 6-7. When addressing the issue of causation pursuant to Section 718.204(c), therefore, the administrative law judge indicated correctly that he had already resolved the conflict among the opinions of Drs. Rosenberg, Repsher and Baker regarding whether coal dust exposure played a role in claimant's totally disabling impairment. Thus, based upon our affirmance of the administrative law judge's weighing of the medical opinions under Section 718.202(a)(4), we also affirm the administrative law judge's finding at Section 718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge