BRB No. 11-0274 BLA

FRANKLIN D. WRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JARISA, INCORPORATED	)	DATE ISSUED: 01/27/2012
	)	
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 on Remand of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

Ronald Gilbertson (Husch Blackwell), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2005-BLA-6151) of Administrative Law Judge William S. Colwell (the administrative law judge), awarding benefits, with respect to a subsequent claim[1] filed on July 26, 2004, pursuant to the

[1] Claimant filed his initial claim for benefits on September 21, 1992. Director's Exhibit 1. Administrative Law Judge Bernard J. Gilday, Jr., denied benefits because he determined that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Id.* The Board and the United States Court of Appeals for the Sixth Circuit affirmed the denial of benefits. *Wright v. Jarisa, Inc.*, No. 95-4036 (6th Cir. Oct. 4, 1996)(unpub.) *aff'g Wright v. Jarisa, Inc.*, BRB No. 95-0111 BLA (July 26, 1995)(unpub.). Claimant filed a second claim on May 14, 1999. Director's Exhibit 1.

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).[2] This case is before the Board for the second time. In its Decision and Order on Reconsideration *En Banc*,[3] the Board affirmed the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), based on his finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). *Wright v. Jarisa, Inc.*, BRB No. 08-0584 BLA, slip op. at 2-4 (Dec. 23, 2009)(unpub.)(*en banc*)(McGranery and Hall, JJs, concurring and dissenting). However, the majority of the Board agreed with employer that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), because he did not provide a proper basis for crediting Dr. Baker's opinion. *Id.* at 6-7. In addition, the majority held that the administrative law judge did not address the reasons given by Drs. Dahhan and Fino for excluding claimant's coal dust exposure as a cause of his chronic obstructive pulmonary disease (COPD). *Id*. at 7. As a

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Administrative Law Judge Daniel J. Roketenetz denied benefits on the ground that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *Id.* On appeal, the Board affirmed the denial of benefits. *Wright v. Jarisa, Inc.*, BRB No. 02-0542 BLA (Apr. 24, 2003)(unpub.). Claimant took no further action until filing the current subsequent claim on July 26, 2004. Director's Exhibit 2.

[2] The 2010 amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, do not apply to this claim, as it was filed before January 1, 2005.

[3] In the Board's initial Decision and Order in the instant claim, it affirmed the administrative law judge's finding that the new evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). *F.D.W.* [*Wright*] *v. Jarisa, Inc.*, BRB No. 08-0584 BLA (May 21, 2009)(unpub.). The Board, therefore, affirmed the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. On the merits, the Board affirmed the administrative law judge's findings that claimant established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a), that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that he is totally disabled at 20 C.F.R. §718.204(b)(2). The Board also affirmed the administrative law judge's finding that the evidence was sufficient to establish that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the Board affirmed the administrative law judge's award of benefits. Employer subsequently requested reconsideration by the Board, sitting *en banc*.

result, the majority vacated the administrative law judge's findings concerning legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation 20 C.F.R. §718.204(c). *Id*. Accordingly, the majority vacated the administrative law judge's award of benefits. *Id*. at 7-8.

On remand, the administrative law judge again determined, based on Dr. Baker's opinion, that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Therefore, the administrative law judge reaffirmed his previous finding that claimant also established disability causation at 20 C.F.R. §718.204(c) and the award of benefits.

Employer appeals, arguing that the administrative law judge erred in finding that the medical opinion evidence, specifically Dr. Baker's opinion, established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). In addition, employer asserts that the administrative law judge did not follow the Board's instructions in determining that disability causation was established at 20 C.F.R. §718.204(c), as he did not separately address whether clinical or legal pneumoconiosis had an adverse effect on claimant's respiratory condition. Claimant responds, urging an affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this 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 supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

I. 20 C.F.R. §718.202(a)(4) – Legal Pneumoconiosis

A. The Administrative Law Judge's Findings

On remand, the administrative law judge reconsidered the medical opinions of Drs. Baker, Dahhan, and Fino at 20 C.F.R. §718.202(a)(4). The administrative law judge determined that Dr. Baker's opinion, that claimant's obstructive lung disease was due to coal dust exposure and smoking, was reasoned and documented, as it was premised on views consistent with the position of the Department of Labor (DOL) in the preamble to the regulations. Decision and Order on Remand at 7. The administrative law judge further found that Dr. Baker cited to medical literature to support his opinion, that both coal dust and smoking can cause a significantly reduced FEV1, and considered the specific medical data in this claim. *Id.* In addition, the administrative law judge concluded that, while the pulmonary function studies demonstrated some reversibility after the use of bronchodilators, "there was a residual, totally disabling component to the testing (indicating the presence of an irreversible disease process)." *Id.* Therefore, the administrative law judge accorded greatest weight to Dr. Baker's opinion. *Id.*

In contrast, the administrative law judge accorded less weight to the opinions of Drs. Dahhan and Fino, that claimant's respiratory impairment was due solely to cigarette smoking, because he determined they were insufficiently reasoned. Decision and Order on Remand at 4-7. The administrative law judge found that Dr. Dahhan did not adequately address the irreversible, totally disabling component of the respiratory impairment that remained after the administration of bronchodilators. *Id.* at 4. The administrative law judge determined that Dr. Fino's opinion, that the medical literature does not support a finding that coal dust exposure alone can cause significant COPD, is inconsistent with the DOL's position that coal dust induced lung disease can cause a significant loss in lung function. *Id.* at 4-5. Additionally, the administrative law judge found that Drs. Dahhan and Fino based their opinions on generalities, including that coal dust inhalation cannot result in a significant loss of FEV1 lung function, rather than on the particular facts of this case. *Id.* at 5-6. The administrative law judge indicated that Dr. Fino ruled out the presence of restrictive lung disease and pulmonary fibrosis because claimant's total lung capacity was not reduced. *Id.* at 6. However, the administrative law judge determined that the regulations do not require that a miner have a restrictive lung impairment in order for the impairment to have been contributed to by coal dust. *Id.* The administrative law judge found that, like Dr. Dahhan, Dr. Fino focused only on a smoking induced respiratory impairment and did not address the cause of the irreversible and disabling component. *Id.* The administrative law judge further found that Dr. Fino did not address whether the reduced diffusing capacity he observed is consistent with coal dust induced lung disease or whether claimant could be suffering from multiple lung diseases. *Id.* at 6-7.

B. Arguments on Appeal

Employer asserts that, contrary to the administrative law judge's finding and Dr. Baker's opinion, the presence of qualifying pulmonary function and blood gas studies are not determinative of the presence of legal pneumoconiosis. Employer argues that, in violation 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), 30 U.S.C. §932(a), the administrative law judge did not offer valid reasons for crediting Dr. Baker's opinion or for discrediting the opinions of Drs. Dahhan and Fino. Employer also contends that the administrative law judge erred in relying on the DOL's comments in the preamble to the regulations because they "do not rise to the level of law" and do not create an assumption that every miner's disabling respiratory impairment is due to legal pneumoconiosis. Employer's Brief at 8.

Employer further argues that Dr. Baker's most recent opinion is merely a restatement of his prior opinion, which Administrative Law Judge Daniel J. Rokotenetz discredited in his March 15, 2002 Decision and Order. Employer alleges that Dr. Baker did not explain why cigarette smoking could not be the sole cause of claimant's respiratory impairment. Thus, according to employer, Dr. Baker's opinion was speculative and conclusory, because the fact that coal dust could be a contributing factor to claimant's impairment does not mean that it was. Further, employer contends that the administrative law judge substituted his opinion for that of the medical experts by finding that claimant's worsening FEV1 values were a valid basis for diagnosing an impairment due to coal dust exposure.

Employer argues that, in contrast, the opinions of Drs. Dahhan and Fino are consistent with known science. Employer maintains that, because Drs. Dahhan and Fino based their opinions on their examinations of claimant and the results of the objective tests, the administrative law judge erred in determining that they were based on generalities.

As an initial matter, we hold that it was not error for the administrative law judge to rely on the DOL's comments in the Federal Register to support his findings, as a determination of whether a medical opinion is supported by accepted scientific evidence, as determined by the DOL in the preamble to revised regulations, is a valid criterion in deciding whether to credit an opinion. *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). Thus, the administrative law judge acted within his discretion in crediting Dr. Baker's opinion because it was consistent with the medical literature accepted by the DOL. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002).

In addition, contrary to employer's contention, the administrative law judge was not required to determine that Dr. Baker's diagnosis of legal pneumoconiosis was unreasoned. Rather, the administrative law judge rationally determined that Dr. Baker's diagnoses of a moderate obstructive defect and moderate resting arterial hypoxemia, were supported by the objective studies that he conducted. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order on Remand at 7; Director's Exhibit 12; Claimant's Exhibit 1 at 5-7. The administrative law judge also rationally found that Dr. Baker adequately explained how his diagnosis of legal pneumoconiosis was supported by the objective testing, the positive x-ray evidence, and the prevailing medical literature, which recognizes that coal dust exposure can cause a significant obstructive impairment and that the effects of smoking and coal dust inhalation are additive. *See Cornett v. Benham Coal Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000); Decision and Order on Remand at 7; Claimant's Exhibit 1 at 6, 9, 11.

Regarding the administrative law judge's weighing of the opinions of Drs. Dahhan and Fino, employer's allegation that the administrative law judge substituted his opinion for that of the physicians is without merit. The administrative law judge acted within his discretion in according less weight to the opinions of Drs. Dahhan and Fino because they relied on the reversibility of claimant's impairment and the significant loss of FEV1 values without addressing the totally disabling impairment that remained, even after the administration of bronchodilators. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004) (unpub.); Decision and Order on Remand at 4-5.

The administrative law judge also acted within his discretion in finding that Dr. Fino's opinion, that the medical literature does not support a determination that coal dust exposure alone can cause significant COPD, is not consistent with the DOL's findings in the preamble to the regulations, that coal dust exposure may produce disabling COPD, and that the effects may be additive with smoking. *See Obush*, 24 BLR at 1-125-26; Decision and Order on Remand at 3, 5, *citing* 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000). Therefore, as the administrative law judge provided a valid reason for discrediting the opinions of Drs. Dahhan and Fino, and for crediting Dr. Baker's opinion, we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

II. 20 C.F.R. §718.204(c)

A. The Administrative Law Judge's Findings

Upon finding that claimant suffers from legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge reaffirmed his previous finding that claimant established disability causation at 20 C.F.R. §718.204(c). Decision and Order on Remand at 7. Accordingly, the administrative law judge awarded benefits. *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge did not comply with the Board's remand instructions because he did not address whether claimant's clinical pneumoconiosis and legal pneumoconiosis had an adverse effect on his respiratory impairment at 20 C.F.R. §718.204(c). Employer argues that, even if Dr. Baker's opinion could support a diagnosis of legal pneumoconiosis, it is insufficient to establish disability causation. Relying on *Collins v. Whitaker Coal Co*., BRB No. 10-0356 BLA (March 24, 2011)(unpub.), employer argues that Dr. Baker's opinion is insufficient to establish disability causation because it does not contain an explanation for his conclusion that claimant's impairment was due, in part, to coal dust exposure. Employer also contends that, pursuant to 20 C.F.R. §725.309(d)(1), the administrative law judge should have weighed the record evidence from the prior claim, which corroborates the opinions of Drs. Dahhan and Fino. Employer further alleges that the administrative law judge did not adequately explain how Dr. Baker's conclusory and speculative opinion, that claimant's history of coal dust exposure might have a twenty percent contribution to claimant's impairment, outweighs all of the other evidence of record.

Contrary to employer's contention, Dr. Baker's opinion in this case is distinguishable from his opinion in *Collins* as, in his report and deposition, Dr. Baker did more than merely conclude, or check a box indicating, that claimant's impairment was due to coal dust exposure. *See Collins*, slip op. at 9. Rather, as the administrative law judge found, Dr. Baker discussed his findings, based on his examination of claimant and the results of the objective testing, and stated that both coal dust and smoking contributed to claimant's impairment, as the effects from the two are additive. *See* Decision and Order on Remand at 7; Director's Exhibit 12; Claimant's Exhibit 1 at 6, 9, 11. Further, the administrative law judge correctly determined that Dr. Baker's opinion was not conclusory or speculative, as the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that it is not necessary for a physician to apportion the causes of total disability as long as pneumoconiosis was a substantial cause of the disability. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483. Therefore, the administrative law judge permissibly relied on Dr. Baker's opinion at 20 C.F.R.

§718.204(c). *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.

In its initial Decision and Order, the Board held that the administrative law judge "reasonably relied upon the more recent medical opinions since they more accurately reflect claimant's current condition." *Wright*, BRB No. 05-0584 BLA, slip op. at 9. Because employer has not demonstrated any error, but merely argues that the prior evidence supports the opinions of Drs. Dahhan and Fino, which the administrative law judge has permissibly discredited, our prior holding remains the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Therefore, we affirm the administrative law judge's determination that claimant established disability causation at 20 C.F.R. §718.204(c). Finally, although employer maintains correctly that the Board instructed the administrative law judge to consider whether clinical pneumoconiosis, alone, could establish disability causation at 20 C.F.R. §718.204(c), the administrative law judge was not required to address this issue in light of his finding that claimant's legal pneumoconiosis contributed to his disabling respiratory impairment.

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

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