U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0095 BLA

CHARLES COUCH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALAMO TRUCKING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	DATE ISSUED: 01/30/2019
	)	
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 Awarding Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Clayton Daniel Scott (Porter, Banks, Baldwin & Shaw, PLLC), Paintsville, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05882) of Administrative Law Judge Christopher Larsen, rendered on a claim filed on July 1, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 19.5 years of surface coal mine employment, but found that only ten years occurred in conditions substantially similar to those in an underground coal mine.[1] Because claimant had less than fifteen years of qualifying coal mine employment, the administrative law judge found that he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2]

The administrative law judge next considered whether claimant established entitlement pursuant to 20 C.F.R. Part 718 without the benefit of the presumption. Although the x-ray and medical opinion evidence did not establish the existence of clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1),(4), the administrative law judge found that the medical opinion evidence establishes that claimant has legal pneumoconiosis[4] in the form of chronic bronchitis due to both coal mine dust exposure and

[1] Claimant's last coal mine employment was in Kentucky. Director's Exhibit 5. 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, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the evidence establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

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

[4] "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). A disease "arising out of coal mine employment" includes "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).

cigarette smoking under 20 C.F.R. §718.202(a)(4). In addition, he found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis and that his total disability is due to pneumoconiosis. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[5]

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 establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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 an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. Legal Pneumoconiosis

To prove that he has legal pneumoconiosis, claimant must establish that he has a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).[6]

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] As the administrative law judge specifically found that claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a), we need not address employer's argument that the administrative law judge erred in finding that the evidence on the issue of clinical pneumoconiosis is in equipoise. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); Employer's Brief at 8-9.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Ajjarapu, Fino, and Dahhan. Decision and Order at 8-13.

All three doctors diagnosed claimant with a disabling obstructive respiratory impairment based on claimant's pulmonary function testing. Director's Exhibits 15, 16; Employer's Exhibit 1. Dr. Ajjarapu opined that claimant's obstructive impairment is chronic bronchitis, and that it is due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 15 at 40. Thus she diagnosed legal pneumoconiosis. *Id.* In contrast, Dr. Fino opined that claimant has emphysema due to cigarette smoking. Director's Exhibit 16. He concluded that claimant's obstructive respiratory impairment is unrelated to coal mine dust exposure. *Id.* Dr. Dahhan opined that claimant has emphysema and chronic bronchitis due to cigarette smoking, and that claimant's obstructive respiratory impairment is unrelated to coal mine dust exposure. Employer's Exhibits 1, 4.

The administrative law judge found Dr. Ajjarapu's opinion credible and sufficient to establish the existence of legal pneumoconiosis because Dr. Ajjarapu's rationale for diagnosing the disease is consistent with the medical science accepted by the Department of Labor in the preamble to the 2001 revised regulations, and, unlike Drs. Fino and Dahhan, she adequately accounted for both claimant's exposure to coal mine dust and his smoking history.[7] Decision and Order at 12-13. He discredited the opinions of Drs. Fino and Dahhan[8] because they were not adequately reasoned and they failed to explain why

[7] We reject employer's allegation that the administrative law judge's reference to the preamble constitutes a violation of the Administrative Procedure Act. Employer's Brief at 10-13. An administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact relevant to the elements of entitlement. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Contrary to employer's contention, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, 694 F.3d at 802. Accordingly, we reject employer's argument that the administrative law judge erred in consulting the preamble in his evaluation of the medical opinion evidence.

[8] The administrative law judge summarized the qualifications of all three physicians and found that "there is no basis in this case to prefer the opinions of Drs. Fino and Dahhan over the opinion of Dr. Ajjarapu" based on their credentials. Decision and Order at 11.

claimant's nearly twenty years of coal mine dust exposure could not have contributed, along with smoking, to his disabling impairment.[9] *Id*.

Employer argues that the administrative law judge erred in weighing the opinions of Drs. Fino and Dahhan. Employer's Brief at 9-17. We disagree. The administrative law judge noted that both doctors relied on their "review of the medical literature" to exclude coal mine dust exposure as a cause of claimant's disabling obstructive respiratory impairment, as measured by the FEV1 value on pulmonary function testing. Decision and Order at 12. Specifically, Dr. Fino stated that the medical literature indicates that ninety percent of miners suffer an average loss of FEV1 that he characterized as not "clinically significant." Director's Exhibit 16 at 10. He opined that only six to eight percent of miners exposed to coal mine dust "will develop clinically important losses in FEV1." *Id*. at 11. Further, he explained that cigarette smoking is the leading cause of chronic obstructive pulmonary disease (COPD). *Id*. at 16. While conceding that coal mine dust can cause COPD, he opined that the "impact of cigarette smoking is far greater than that of coal mine dust." *Id*. Based on these factors, Dr. Fino excluded a diagnosis of legal pneumoconiosis.[10] *Id*. at 17-18.

Because employer does not challenge this finding, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[9] We reject employer's argument that the administrative law judge shifted the burden of proof in this case. Employer's Brief at 12-13. Specifically, employer alleges that the administrative law judge required it to disprove that claimant has legal pneumoconiosis. *Id*. Contrary to employer's argument, the administrative law judge recognized that claimant "bears the burden to establish that he suffers from pneumoconiosis." Decision and Order at 6. He also found that claimant met his burden to establish the existence of legal pneumoconiosis because Dr. Ajjarapu's diagnosis of legal pneumoconiosis outweighed the contrary opinions of Drs. Fino and Dahhan. *Id*. at 13.

[10] Dr. Fino also explained that, based on the medical literature, a doctor can utilize "the results of a chest x-ray . . . to quantitate the amount of coal mine dust contribution to a miner's overall pulmonary impairment due to emphysema." Director's Exhibit 16 at 12. He noted that, because claimant has a negative chest x-ray, he is only going to have a "7-10 [percent] additional loss of FEV1 due to coal [mine] dust." *Id*. at 14. He also noted that claimant's diffusion capacity was reduced by 35%, which he opined is "unusual in coal mine dust-induced disease," but is consistent with cigarette smoking-related lung disease. *Id*. at 17.

Similarly, Dr. Dahhan opined that the "impact of coal [mine] dust on the respiratory system . . . is estimated to be [a] 5-9 cc loss in the FEV1 per year of coal [mine] dust exposure." Employer's Exhibit 1 at 5-6. He opined that this average loss of FEV1 "is a trivial amount considering the actual amount of loss that [claimant] demonstrates in his pulmonary function studies." *Id.* Thus, he opined that coal mine dust exposure could not account for claimant's obstructive respiratory impairment. He concluded that claimant's cigarette smoking history caused his obstructive lung disease. *Id.*

Noting that studies found credible by the Department of Labor in the preamble recognize that the risks associated with cigarette smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited the opinions of Drs. Fino and Dahhan because they did not explain why coal dust exposure did not contribute, along with cigarette smoking, to claimant's obstructive impairment.[11] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (holding that an administrative law judge permissibly rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 12-13.

Employer next argues that the administrative law judge erred in weighing Dr. Ajjarapu's opinion, contending that Dr. Ajjarapu relied on a cigarette smoking history that was half the number of pack-years assumed by Drs. Fino and Dahhan. Employer's Brief at 17-21. Employer asserts that the administrative law judge failed to take this factor into account when weighing Dr. Ajjarapu's diagnosis of legal pneumoconiosis. *Id.* Employer also argues that the administrative law judge failed to address whether Dr. Ajjarapu's opinion is adequately reasoned. *Id*. Employer's arguments have no merit.

The record does not support employer's argument that Dr. Ajjarapu relied on a "significantly reduced smoking history" as compared to Drs. Fino and Dahhan. Employer's Brief at 21. In her initial report, Dr. Ajjarapu noted that claimant is a current smoker who started smoking in 1959 and smokes less than one-half of a pack of cigarettes per day. Director's Exhibit 15 at 39. Dr. Ajjarapu described that smoking history as

[11] Contrary to employer's argument, the administrative law judge did not discredit the opinions of Drs. Fino and Dahhan because their rationales were contrary to the medical science credited by the DOL in the preamble. Employer's Brief at 10-12. Rather, he found that neither physician adequately explained his basis for excluding coal mine dust exposure as a contributing cause of claimant's obstructive lung disease. Decision and Order at 12-13.

"extensive," and noted that "according to research, smoking compounds the effects of coal dust." *Id*. at 41. Drs. Fino and Dahhan also recorded that claimant is a current smoker who started smoking around 1958, but they noted that he smokes one pack per day. Director's Exhibit 16 at 3; Employer's Exhibit 1 at 1. After Dr. Ajjarapu issued her initial report, the district director asked her to review and address Dr. Fino's findings. Director's Exhibit 15 at 1-5. The district director informed Dr. Ajjarapu that Dr. Fino recorded a coal mine employment history of twenty years and a smoking history of "one pack per day since 1958," and asked her whether she maintained her opinion after her review of Dr. Fino's opinion. *Id*. at 3. In response, she reiterated her diagnosis of legal pneumoconiosis.[12] *Id*.

Even assuming that Dr. Ajjarapu underestimated claimant's cigarette smoking history, the administrative law judge acknowledged employer's argument that Dr. Ajjarapu's opinion "is flawed because she noted a smoking history of less than [one-half of] a pack a day" in her initial report. Decision and Order at 12. The administrative law judge permissibly declined to reject Dr. Ajjarapu's opinion on this basis because he reasonably found her opinion consistent with the conclusion in the preamble that "there is an additive risk for developing significant obstruction for miners exposed to coal dust who are also exposed to cigarette smoke." Decision and Order at 12; *see* 65 Fed. Reg. at 79,940; *Rowe*, 710 F.2d at 255; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); Director's Exhibit 15.

Further, when discussing Dr. Ajjarapu's diagnosis of legal pneumoconiosis, the administrative law judge summarized the physician's rationale for opining that claimant's obstructive respiratory impairment, in the form of chronic bronchitis, is due to both coal

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[12] In her updated opinion, Dr. Ajjarapu explained her reasoning for concluding that "both tobacco abuse and coal dust" contributed to claimant's impairment:

> Chronic [o]bstructive pulmonary disease is an inflammatory lung disease caused by the inhalation of toxic particles and gases that result in destruction of the lung parenchyma and remodeling of the airways. Tobacco smoke, coal dust[,] and other toxic materials can all contribute to the same inflammatory process. Also, when a miner smokes or a smoker works in the mines, the tobacco smoke is a compounding factor and accentuates the inflammatory process. When both toxins coexist . . . it is virtually impossible to separate the damage induced by these toxins, and partition which damage is due to one toxin versus the other and quantify it.

Director's Exhibit 15 at 1.

mine dust and cigarette smoking exposures.[13] Decision and Order at 8-9. He noted that Dr. Ajjarapu "explained that both exposures cause the release of cytokine and subsequent inflammation and secretions in the airways causing bronchitic symptoms." *Id.*; *see* Director's Exhibit 15. Further, he recognized that Dr. Ajjarapu reiterated her diagnosis of legal pneumoconiosis after reviewing Dr. Fino's opinion. *Id.* at 8-9. He again summarized her rationale for diagnosing legal pneumoconiosis:

> Dr. Ajjarapu stated further that tobacco smoke, coal dust, and other toxic materials can all contribute to the same inflammatory process. She noted further that coal dust and cigarette smoke can be a compounding factor and accentuate the inflammatory process. Dr. Ajjarapu stated that when both toxins co-exist, it is virtually impossible to separate the damage caused by each particular toxin. . . . Dr. Ajjarapu concluded [that claimant] has a severe pulmonary impairment due to both tobacco abuse and coal dust exposure, and she stated coal dust exposure had a material adverse effect on [claimant's] pulmonary function.

Id. at 9. Contrary to employer's argument, the administrative law judge permissibly found that Dr. Ajjarapu's rationale for diagnosing legal pneumoconiosis was persuasive because it is consistent with the preamble, which sets forth that "coal [mine] dust is clearly associated with severe respiratory impairments even in the absence of smoking and that '[s]mokers who mine have [an] additive risk for developing significant obstruction.'" Decision and Order at 12-13, *quoting* 65 Fed. Reg. at 79,940; *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77 (6th Cir. 2000) (holding that legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them); *Rowe*, 710 F.2d at 255.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences

[13] The administrative law judge also noted that Dr. Ajjarapu diagnosed claimant with an obstructive respiratory impairment based on pulmonary function testing and "chronic bronchitis based on [claimant's] symptoms of dyspnea, wheezing and cough . . . ." Decision and Order at 8.

for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the medical opinion evidence establishes that claimant has legal pneumoconiosis, in the form of chronic bronchitis due, in significant part, to coal mine dust exposure. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 11-13.

II. TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Employer argues that the administrative law judge failed to apply the proper standard for rendering his disability causation determination at 20 C.F.R. §718.204(c). Employer's Brief at 23. We agree.[14] Notwithstanding the administrative law judge's error, however, remand is not required because no factual issues remain to be determined and no further factual development is necessary. *See Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989); *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014).

Drs. Ajjarapu, Fino, and Dahhan agree that claimant's COPD alone caused his disabling impairment. The administrative law judge permissibly determined that claimant's COPD *is* legal pneumoconiosis. Because the record reveals no other condition that contributed to his total disability, pneumoconiosis thus is the sole cause of claimant's impairment, satisfying claimant's burden to establish disability causation as a matter of law. *See* 20 C.F.R. §718.204(c)(1) (pneumoconiosis must be a "substantially contributing cause" of the total disabling respiratory impairment.); *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016) (physician's determination that pneumoconiosis had an adverse effect on the miner's respiratory condition and contributed to the miner's disabling impairment satisfies substantially contributing cause standard); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489-90 (6th Cir. 2012). Thus, we need not vacate the administrative law judge's conclusion that Dr. Ajjarapu's opinion is

[14] When evaluating whether claimant established disability causation, the administrative law judge concluded that, "based on my finding that [claimant] has established legal pneumoconiosis, I find [that] he has established that at least a portion of his pulmonary or respiratory disability is due to pneumoconiosis." Decision and Order at 16. This is not the proper standard under the regulations for establishing disability causation. Rather, claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1).

sufficient to satisfy claimant's burden of establishing total disability causation, and we affirm the award of benefits under Part 718.[15] *See Trent*, 11 BLR at 1-27.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[15] We additionally note that, because Drs. Fino and Dahhan did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that legal pneumoconiosis was established, the administrative law judge could accord their opinions, at most, little weight at disability causation. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015).