

BRB No. 04-0806 BLA

DOUGLAS WARD )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 OLGA COAL COMPANY )  
 )  
 and )  
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 WEST VIRGINIA COAL-WORKERS' ) DATE ISSUED: 07/21/2005  
 PNEUMOCONIOSIS FUND )  
 )  
 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 Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Carrier appeals the Decision and Order Awarding Living Miner's Benefits (03-BLA-6277) of Administrative Law Judge Thomas M. Burke 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 correctly noted that this case involves a subsequent claim. The administrative law judge determined that claimant demonstrated a change in one of the applicable conditions of entitlement, and then, based on his consideration of all of the evidence of record, he found the evidence sufficient to establish entitlement to benefits. Accordingly, benefits were awarded, commencing in March, 2001.

On appeal, carrier asserts that the medical opinions relied upon by the administrative law judge do not establish that claimant's pneumoconiosis was a substantially contributing cause of his pulmonary impairment. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a brief in this appeal.<sup>1</sup>

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).

Carrier asserts that the medical opinions that the administrative law judge relied upon to find disability causation established pursuant to 20 C.F.R. §718.204(c) do not establish that pneumoconiosis was a substantially contributing cause of claimant's pulmonary impairment. Specifically, carrier asserts that Dr. Jabour did not provide an opinion on the extent to which claimant's impairment prevents him from performing his last coal mine job, and that the administrative law judge erred by relying on Dr. Jabour's opinion to find disability causation established. Carrier also contends that the administrative law judge erred in finding Dr. Piracha's opinion supportive of a finding that claimant's disability is due to pneumoconiosis pursuant to Section 718.204(c).

In finding the evidence sufficient to establish that claimant's disability is due to pneumoconiosis pursuant to Section 718.204(c), the administrative law judge noted that Drs. Rasmussen, Jabour and Piracha opined that claimant's disability "stems from his

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<sup>1</sup> The administrative law judge's finding that claimant has established a change in one of the applicable conditions of entitlement, as well as his findings that claimant has established the existence of pneumoconiosis arising out of coal mine employment, that he is totally disabled from a pulmonary standpoint, and that benefits commence in March 2001, are not challenged on appeal. Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

coal dust induced respiratory impairment. Only Dr. Zaldivar states that the disability is due to the miner's cardiac surgery." Decision and Order at 14. The administrative law judge stated "For reasons previously stated in this opinion, the undersigned accords greater weight to the opinion of Dr. Rasmussen, which is supported by Drs. Jabour and Piracha." Decision and Order at 14.

In a 2002 opinion, Dr. Piracha indicated that he had treated claimant for "a number of years." Dr. Piracha stated:

Since he has no clinical evidence of congestive heart failure, and his left ventricular function has been normal, his dyspnea has to be attributed to his pulmonary impairment. With x-ray evidence of pneumoconiosis, one has to presume this as an etiology for his impairment. I cannot say whether this total disability is due to his coal-worker's pneumoconiosis or his previous history of smoking. However, both by clinical history and by objective tests, he does show pulmonary impairment.

Director's Exhibit 23; Claimant's Exhibit 1.

Dr. Jabour examined claimant in 1994, and diagnosed pneumoconiosis and coronary artery disease, due to coal dust and cigarette smoking. Dr. Jabour opined that claimant had a forty percent impairment and, in answering the question regarding the extent to which the diagnosed conditions contributed to claimant's impairment, he indicated "pneumoconiosis 80%" and noted that claimant is asymptomatic from coronary artery disease since "CABG". Director's Exhibit 1.

We first consider carrier's assertion that the administrative law judge erred by finding that Dr. Jabour's opinion supports a finding that claimant's disability is due to pneumoconiosis pursuant to Section 718.204(c). Carrier argues that Dr. Jabour did not provide an opinion on the extent to which claimant's impairment prevents him from performing his last coal mine job, and, thus, the administrative law judge erred by relying on Dr. Jabour's opinion to find disability causation established. Having determined that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), a finding that is not contested on appeal, it was proper for the administrative law judge to next consider the medical opinion evidence to determine whether claimant has established that his pneumoconiosis is a contributing cause of his total disability. *See* 20 C.F.R. §§718.204(b), 718.204(c); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

We hold that the administrative law judge rationally considered the portion of Dr. Jabour's opinion that addresses the cause of claimant's disability and reasonably

concluded that Dr. Jabour's opinion, that eighty percent of claimant's forty percent impairment is due to pneumoconiosis, *see* Director's Exhibit 1, is supportive of a finding that claimant's pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to Section 718.204(c). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). We therefore reject carrier's assertion that Dr. Jabour's opinion does not support a finding of disability causation pursuant to Section 718.204(c).

We next turn to carrier's assertions regarding Dr. Piracha's opinion. Carrier alleges that the administrative law judge misstated Dr. Piracha's opinion. In its brief on appeal, carrier quotes a portion of Dr. Piracha's opinion, wherein the physician stated "I cannot say whether his total disability is due to his CWP or his previous history of smoking." Carrier's Brief at 3. Carrier also contends that Dr. Piracha's opinion does not support a finding that pneumoconiosis is a substantially contributing cause of claimant's impairment.

A review of Dr. Piracha's opinion indicates that he has provided more discussion of disability causation than what is quoted by carrier. Dr. Piracha stated "With x-ray evidence of pneumoconiosis, one has to presume this as an etiology for his impairment. I cannot say whether this total disability is due to his coal-worker's pneumoconiosis or his previous history of smoking." Director's Exhibit 23; Claimant's Exhibit 1. In view of the entirety of Dr. Piracha's opinion regarding disability causation, we hold that the administrative law judge's summary of this opinion is not inaccurate, as carrier alleges. *See* Director's Exhibit 23; Claimant's Exhibit 1.

Moreover, the administrative law judge stated that Drs. Rasmussen, Jabour and Piracha "state that the miner's disability stems from his coal dust induced respiratory impairment." Decision and Order at 14. The administrative law judge primarily credited Dr. Rasmussen's opinion that claimant's coal mine dust exposure is a major contributing factor to claimant's disability, and noted that Dr. Rasmussen's opinion is supported by the medical opinions of Drs. Jabour and Piracha. Decision and Order at 14. The administrative law judge's reliance upon Dr. Rasmussen's opinion at Section 718.204(c) is not challenged on appeal. In view of the entirety of Dr. Piracha's opinion regarding disability causation, we hold that the administrative law judge did not err in finding Dr. Piracha's opinion to be supportive of Dr. Rasmussen's opinion, which the administrative law judge primarily relied upon in finding that claimant has established disability causation pursuant to Section 718.204(c). *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara*, 7 BLR 1-167.

Consequently, we affirm the administrative law judge's finding that claimant has established that his pneumoconiosis is a substantially contributing cause of his respiratory impairment pursuant to Section 718.204(c). As carrier puts forth no additional allegations of error on appeal, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge