

BRB No. 08-0718 BLA

C.A.R.)
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 Claimant-Petitioner)
)
 v.)
)
 GOLDEN OAK MINING COMPANY)
)
 and)
)
 AMERICAN MINING INSURANCE) DATE ISSUED: 07/29/2009
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Benefits (2004-BLA-5813) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a claim filed on October 31, 2002, 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). Director's

Exhibit 2. This case is before the Board for the second time. In his prior Decision and Order, issued on March 29, 2006, the administrative law judge credited claimant with 15.86 years of qualifying coal mine employment and adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).¹ Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal, the Board affirmed the administrative law judge's unchallenged findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3) and held that he permissibly found that claimant failed to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4). [*C.A.R.*] v. *Golden Oak Mining Co.*, BRB No. 06-0597 BLA (Jan. 31, 2007) (unpub.). The Board, however, vacated the administrative law judge's finding that the evidence was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) because the administrative law judge did not consider that Dr. Baker attributed claimant's obstructive airway disease to his coal mine employment. *Id.* The Board remanded the case for the administrative law judge to consider whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis based on the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Id.*

On remand, the administrative law judge found that claimant failed to establish the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and total disability due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence pursuant to Section 718.202(a)(4) and failed to comply with 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). Claimant also alleges that Dr. Westerfield's medical opinion is hostile to the Act and that the administrative law judge did not address this issue. In response, employer urges the

¹ The administrative law judge applied the disability regulation set forth in 20 C.F.R. §718.204(c)(2000). After revision of the regulations, the provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

Board to reject claimant's arguments and affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, submitted a letter stating that he will not file a substantive response unless specifically requested to do so by the Board.

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.² 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the relevant evidence, finding that only Dr. Baker diagnosed legal pneumoconiosis, while Drs. Westerfield and Dahhan opined that claimant does not suffer from a coal mine dust-related pulmonary or respiratory impairment.³ Decision and Order at 7. The administrative law judge initially found that because Drs. Baker, Westerfield and Dahhan are Board-certified pulmonary specialists and, therefore, have comparable expertise in assessing the issue of legal pneumoconiosis, their qualifications are not a determining factor. *Id.*; Director's Exhibits 20, 29; Claimant's Exhibit 2; Employer's Exhibit 1.

The administrative law judge acknowledged that Dr. Baker reviewed claimant's medical records, the opinions of Drs. Westerfield and Dahhan, and claimant's work and smoking histories. Decision and Order at 6. The administrative law judge, however, found that Dr. Baker's explanation, documentation, and reasoning are inadequate. *Id.* at 7. The administrative law judge noted that because Dr. Baker's diagnosis of clinical pneumoconiosis was discredited, those parts of his opinion that relied on evidence of clinical pneumoconiosis as the basis for his finding of legal pneumoconiosis, are

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

³ The administrative law judge also determined that claimant had a seventy-two pack-year smoking history and currently smokes six cigarettes per day. Decision and Order at 11.

undermined. *Id.* The administrative law judge further found that Dr. Baker's opinion was internally inconsistent and equivocal because he stated that he could not partition the effects of coal dust and cigarette smoking, but subsequently estimated that the contribution of coal dust exposure is "perhaps ... 15 to 20% ... [and] ... there is approximately a 15 to 20 or 25% contribution to her symptoms." *Id.* at 7-8, *citing* Claimant's Exhibit 1. The administrative law judge found:

More significantly, when one excludes the diagnosis of clinical pneumoconiosis, Dr. Baker's finding of legal pneumoconiosis is based strictly upon unspecified medical literature which reportedly states that "coal dust *can* cause obstructive airway disease" (emphasis added), in conjunction with studies which reportedly "concluded that one-half to one year of coal dust exposure would equal one-pack year of cigarette smoking."

Id. at 8, *quoting* Claimant's Exhibit 1. The administrative law judge determined that Dr. Baker did not discuss the pattern of impairment, or provide any other rationale, except for multiple exposures, comparing the number of years of claimant's coal mine employment and smoking histories, as the basis for his diagnosis of legal pneumoconiosis. *Id.* The administrative law judge accorded Dr. Baker's opinion little weight on the issue of pneumoconiosis, finding his "analysis to be simplistic and poorly reasoned," and his opinion "conflicting and equivocal." *Id.*

Claimant contends that the administrative law judge: erred in placing significant weight on Dr. Baker's discredited diagnosis of clinical pneumoconiosis, causing it to interfere with his findings on legal pneumoconiosis; erred in finding Dr. Baker's opinion equivocal; improperly substituted his opinion for that of Dr. Baker's opinion; and erred in failing to explain his findings pursuant to the APA. Claimant alleges that because the regulation states that both clinical and legal pneumoconiosis can cause an obstructive ventilatory defect, it is not necessary for Dr. Baker to further opine why coal dust was a causative factor in the miner's known obstructive pulmonary impairment. We reject claimant's contentions.

In his April 27, 2005 report, Dr. Baker stated that claimant has severe obstructive airway disease and lacks the pulmonary capacity to perform the work of an underground coal miner or similar work even in a dust free environment. Claimant's Exhibit 1. Dr. Baker further noted that there is no way to partition the effects of coal dust and cigarette smoking on the lungs and generally referred to various sources that support the fact that coal dust can cause obstructive airway disease. Dr. Baker stated that he relied on NIOSH studies to determine that there is perhaps a 15 to 20% contribution from claimant's approximate 15 years of coal dust exposure to her condition. *Id.*

The Department of Labor (DOL), in its comments regarding the revised definition of pneumoconiosis contained at 20 C.F.R. §718.201, concluded that there was “overwhelming scientific and medical evidence demonstrating that coal mine dust exposure *can* cause obstructive lung disease.” 65 Fed. Reg. 79944 (emphasis added). The DOL, however, did not anticipate that all obstructive lung disorders would be compensable. The preamble to the revised regulations states:

The Department attempts to clarify that not all obstructive lung disease is pneumoconiosis. It remains the claimant’s burden of persuasion to demonstrate that his obstructive lung disease arose out of his coal mine employment and therefore falls within the statutory definition of pneumoconiosis. The Department has concluded, however, that the prevailing view of the medical community and the substantial weight of the medical and scientific literature supports the conclusion that exposure to coal mine dust may cause chronic obstructive pulmonary disease. Each miner must therefore be given the opportunity to prove that his obstructive lung disease arose out of his coal mine employment and constitutes “legal” pneumoconiosis.

65 Fed. Reg. 79923, 79937 (Dec. 20, 2000). Contrary to claimant’s argument, Dr. Baker was required to explain why coal dust was a causative factor for claimant’s chronic obstructive pulmonary disease (COPD), and the administrative law judge permissibly found that there is no regulatory presumption that if a miner suffers from COPD, it necessarily arose, in part, out of coal mine employment. *Id.*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 151 (1989) (*en banc*); Decision and Order at 8. Moreover, the administrative law judge permissibly found Dr. Baker’s analysis of the medical evidence on the issue of legal pneumoconiosis unpersuasive because he did not provide any rationale, “except for multiple exposures,” as the basis for his diagnosis of legal pneumoconiosis. Decision and Order at 8; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Claimant’s Exhibit 1. We affirm, therefore, the administrative law judge’s finding that Dr. Baker’s explanation, documentation and reasoning are inadequate to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). Because the administrative law judge permissibly found that the only opinion of record supportive of a finding of legal pneumoconiosis was insufficient to carry claimant’s burden of proof, we will not address claimant’s additional arguments regarding the administrative law judge’s weighing of the contrary medical opinion evidence.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge