BRB No. 11-0654 BLA

WILLIAM E. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/22/2012
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	
	)	
INTERNATIONAL BUSINESS AND MERCANTILE REASSURANCE COMPANY	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (06-BLA-5190) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the 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). This case involves a claim filed on April 8, 2004,[1] and is before the Board for the second time. Director's Exhibit 2.

Initially, the administrative law judge credited claimant with at least sixteen years of coal mine employment[2] and found that claimant established that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge also found that claimant did not establish the existence of clinical or legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but vacated his finding that claimant failed to establish the existence of legal pneumoconiosis based on the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).[4] *W.D.* [*Davis*] *v. Nat'l Mines Corp.*, BRB No. 08-

[1] Because this claim was filed before January 1, 2005, a recent amendment to the Act does not affect this case. *See* Pub. L. No. 111-148, §1556(a),(c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[2] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[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). "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[4] The Board affirmed, as unchallenged, the administrative law judge's findings that claimant established at least sixteen years of coal mine employment, and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

0376 BLA, slip op. at 3, 5-9 (Feb. 19, 2009)(unpub.). Specifically, the Board held that the administrative law judge erred in failing to properly explain the weight he accorded the conflicting medical opinions. *Davis*, slip op. at 5-9. Accordingly, the Board remanded the case to the administrative law judge for him to reconsider whether the medical opinion evidence established the existence of legal pneumoconiosis, and to explain his findings and credibility determinations, pursuant to 20 C.F.R. §718.202(a)(4). The Board further instructed that if the existence of pneumoconiosis was established, the administrative law judge was then to determine whether the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Davis*, slip op. at 9. By Order dated January 21, 2010, the Board summarily denied employer's motion for reconsideration.

On remand, the administrative law judge found that the better reasoned medical opinion evidence established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). Further, the administrative law judge found that claimant established that he is totally disabled due to legal 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 his analysis of the medical opinion evidence when he found that claimant established the existence of legal pneumoconiosis pursuant 20 C.F.R. §718.202(a)(4), and that he is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's award of benefits. Employer filed a reply brief, reiterating its arguments on 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 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 establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *Anderson*

W.D. [*Davis*] *v. Nat'l Mines Corp.*, BRB No. 08-0376 BLA, slip op. at 2 n.2 (Feb. 19, 2009)(unpub.).

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Legal Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Jaworski, Fino, and Renn, and considered the physicians' respective qualifications.[5] Dr. Jaworski opined that the "major cause" of claimant's COPD is smoking, but that coal mine dust exposure also made a "significant contribution" to claimant's COPD. Director's Exhibit 15 at 4; Employer's Exhibit 4 at 16, 26. Drs. Fino and Renn attributed claimant's COPD solely to smoking. Director's Exhibits 20 at 6; 21 at 2; Employer's Exhibits 1 at 17; 2 at 6; 8 at 14.

The administrative law judge found that Dr. Jaworski's opinion was well-documented, because Dr. Jaworski "set forth in detail the employment and smoking histories, pulmonary symptoms, and objective test results upon which he based his diagnosis of legal pneumoconiosis." Decision and Order on Remand at 10. Further, the administrative law judge found that Dr. Jaworski's opinion was well-reasoned, because Dr. Jaworski "clearly explained the rationale for his findings." *Id*. In contrast, the administrative law judge found that the opinions of Drs. Fino and Renn merited "little probative weight." Decision and Order on Remand at 11. Specifically, the administrative law judge found that Dr. Fino's explanation for eliminating coal mine dust exposure as a significant factor in claimant's COPD was inconsistent with the premises underlying the regulations. *Id*. Further, the administrative law judge determined that Dr. Renn "neglected to set for[th] the reasoning behind his opinion," and therefore "failed to explain how he concluded that [c]laimant's COPD was not significantly related to his sixteen years of coal mine dust exposure. . . ." *Id*. Therefore, the administrative law judge credited Dr. Jaworski's opinion diagnosing legal pneumoconiosis, over the contrary opinions of Drs. Fino and Renn.

Employer contends that Dr. Jaworski provided no reasoning for his opinion, but attributed claimant's COPD, in part, to coal mine dust exposure merely because claimant has obstructive lung disease and worked as a miner. Employer's Brief at 12-15. Employer therefore argues that Dr. Jaworski's opinion cannot constitute substantial evidence of legal pneumoconiosis, and the administrative law judge erred in crediting it. We disagree.

[5] The administrative law judge noted that Dr. Jaworski is Board-certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine, and that Drs. Fino and Renn are Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 2, 4, 6.

Contrary to employer's characterization of Dr. Jaworski's opinion, and as the administrative law judge found, Dr. Jaworski explained that coal mine dust and smoking "result in similar changes on pulmonary function testing and that [c]laimant's symptoms and objective test results are consistent with both smoke-induced lung disease and coal dust-induced lung disease." Decision and Order at 10; Employer's Exhibit 4 at 46-48, 51. Further, the administrative law judge considered Dr. Jaworski's explanation that it is not medically feasible to distinguish between an obstructive respiratory condition due to either cigarette smoking or coal mine dust exposure. Employer's Exhibit 4 at 45-46. Further, as the administrative law judge found, Dr. Jaworski relied on claimant's pulmonary function studies revealing moderately severe, irreversible obstruction, and on claimant's smoking and coal mine employment histories, to opine that smoking is the major cause of claimant's COPD, but that there is also a significant contribution from his coal mine dust exposure. Director's Exhibit 15; Employer's Exhibit 4 at 16, 22, 48, 51, 53.

The determination of whether a medical opinion is adequately reasoned is committed to the discretion of the administrative law judge. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Employer's Exhibit 4 at 45-55. In this case, substantial evidence supports the administrative law judge's permissible determination that Dr. Jaworski adequately explained the basis for his opinion that claimant's COPD is significantly related to coal mine dust exposure, and the Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. We therefore reject employer's allegation that Dr. Jaworski's opinion cannot be considered a reasoned diagnosis of legal pneumoconiosis.[6]

Employer also contends that the administrative law judge erred in discounting Dr. Fino's opinion. Employer's Brief at 15-17. We disagree. The administrative law judge acted within his discretion in finding that Dr. Fino's opinion, that claimant's COPD was due entirely to smoking, was entitled to little weight because Dr. Fino relied heavily on studies supporting his conclusion that the amount of clinical pneumoconiosis in the lungs determines the amount of emphysema due to coal dust. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order on Remand at 11. As summarized by the administrative law judge, Dr. Fino opined that, because "the amount of pneumoconiosis present

[6] Because we affirm, on the grounds stated above, the administrative law judge's determination that Dr. Jaworski's opinion was reasoned, we need not address employer's argument that the administrative law judge erred in also finding that Dr. Jaworski's opinion was consistent with findings in the preamble to the regulations, regarding an additive risk of smoking and coal mine dust exposure. *See Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 14.

correlates . . . with the amount of emphysema present," it is "very helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal mine dust inhalation." Employer's Exhibit 1 at 16. As the administrative law judge properly noted, Dr. Fino's reasoning is contrary to the premises underlying the regulations, which permit a finding of legal pneumoconiosis, notwithstanding the absence of radiographic evidence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000)(indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]"); *see also* 20 C.F.R. §§718.202(a)(4),(b); 718.201(a)(1),(2); *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, 24 BLR 2-369, 2-382-83 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

Further, contrary to employer's contention, in evaluating the credibility of Dr. Fino's opinion in light of the Department of Labor's discussion of the medical science cited in the preamble to the amended regulations, the administrative law judge did not improperly treat the preamble as evidence, a legal rule, or a presumption that all obstructive lung disease is pneumoconiosis. Employer's Brief at 11-12. Rather, the administrative law judge permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Looney*, 678 F.3d at 315-16; *Obush*, 24 BLR at 1-125-26. We therefore reject employer's allegation that the administrative law judge erred in discounting Dr. Fino's opinion.

Lastly, employer contends that the administrative law judge erred in discounting Dr. Renn's opinion. Employer's Brief at 17. We disagree. The administrative law judge permissibly found that Dr. Renn's opinion was not well-reasoned, because Dr. Renn did not adequately explain how he concluded that claimant's COPD was due solely to smoking. *See Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-21 (3d Cir. 1997); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155. Substantial evidence supports the administrative law judge's determination that Dr. Renn did not set forth the basis for his conclusion that claimant's COPD was not significantly related to his sixteen years of coal mine dust exposure. Director's Exhibits 20, 21; Employer's Exhibit 2. We therefore reject employer's allegation of error in the administrative law judge's analysis of Dr. Renn's opinion.

Based on the foregoing, we affirm the administrative law judge's decision to credit Dr. Jaworski's opinion over those of Drs. Fino and Renn, and we therefore affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). As employer makes no other

arguments at 20 C.F.R. §718.202(a), the administrative law judge's finding of legal pneumoconiosis is affirmed. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997).

Total Disability Due to Pneumoconiosis

Turning to the issue of the cause of claimant's totally disabling respiratory impairment, the administrative law judge correctly stated that a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989); Decision and Order on Remand at 12. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition, or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i),(ii); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2003).

The administrative law judge found that Dr. Jaworski's opinion, that claimant's COPD "is substantially caused by his coal [mine] dust exposure, and . . . disables him from performing his last coal mine job, equate[s] to a finding that coal dust exposure is a substantial contributor to [claimant's] pulmonary disability." Decision and Order on Remand at 12. The administrative law judge discounted the contrary opinions of Drs. Fino and Renn, because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. The administrative law judge also discounted Dr. Fino's disability causation opinion because he found that it was based on statistical probabilities concerning the "average" loss of FEV1 due to coal mine dust. *Id*. Consequently, the administrative law judge found that claimant established total disability due to legal pneumoconiosis, based on Dr. Jaworski's opinion.

Employer argues that the administrative law judge erred in finding that Dr. Jaworski's opinion is sufficient to establish that claimant's total disability is due to legal pneumoconiosis. Employer's Brief at 12. We disagree. Substantial evidence supports the administrative law judge's determination that Dr. Jaworski's opinion supports a finding that legal pneumoconiosis is a substantially contributing cause of claimant's total disability, under 20 C.F.R. §718.204(c). *See Gross*, 23 BLR at 1-18-19; Director's Exhibit 15 at 4; Employer's Exhibit 4 at 16, 46-51. Employer also argues that the administrative law judge erred in discounting the opinions of Drs. Fino and Renn because they attributed claimant's total disability to smoking. Employer's Brief at 17. Contrary to employer's argument, the administrative law judge rationally discounted the disability causation opinions of Drs. Fino and Renn because the physicians did not diagnose legal

pneumoconiosis, contrary to the administrative law judge's finding.[7] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008). Thus, we affirm the administrative law judge's finding that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), as it is supported by substantial evidence. *See Bonessa*, 884 F.2d at 734, 13 BLR at 2-37; *Gross*, 23 BLR at 1-18-19.

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

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7] In view of our affirmance of the administrative law judge's decision to discount Dr. Fino's disability causation opinion because Dr. Fino did not diagnose legal pneumoconiosis, we need not address employer's challenge to the administrative law judge's additional reason for discounting Dr. Fino's opinion. *See Kozele*, 6 BLR at 1-382-83 n.4; Employer's Brief at 18-19.