

BRB No. 13-0396 BLA

WILMA M. CHUMLEY)
)
 Claimant-Respondent)
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 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 03/26/2014
)
 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

Maia S. Fisher (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 appeals the Decision and Order on Remand (07-BLA-5753) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)

(the Act). This case was filed on July 17, 2006, and is before the Board for the second time.¹ Director's Exhibit 2.

In the initial decision, the administrative law judge credited claimant with fourteen and two-thirds years of coal mine employment,² and found that claimant established the existence of legal pneumoconiosis³ arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and a totally disabling respiratory pursuant to 20 C.F.R. §718.204(c). The administrative law judge further found, however, that claimant failed to establish that pneumoconiosis was a substantially contributing cause of her disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that claimant has fourteen and two-thirds years of coal mine employment, and her finding that claimant established the existence of legal pneumoconiosis, in the form of chronic obstructive and restrictive airways disease due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *Chumley v. Peabody Coal Co.*, BRB No. 11-0862 BLA, slip op. at 2-6 (Sept. 20, 2012) (unpub.). The Board further affirmed the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2).⁴ *Chumley*, slip op. at 6-8. The Board vacated, however, the administrative law judge's finding that claimant failed to establish that pneumoconiosis is a substantially contributing cause of her total disability at 20 C.F.R. §718.204(c). Specifically, the Board held that the administrative law judge erred in concluding that because she had

¹ The complete procedural history of this case is detailed in the Board's last decision. *Chumley v. Peabody Coal Co.*, BRB No. 11-0862 BLA (Sept. 20, 2012) (unpub.).

² The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 5-7. Accordingly, this case arises within the jurisdiction 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).

³ "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).

⁴ In affirming the administrative law judge's findings that the medical opinion evidence established the existence of legal pneumoconiosis and a totally disabling respiratory impairment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv), the Board considered, and rejected, employer's allegations of error, raised in its response brief. *Chumley*, slip op. at 3-7.

found, pursuant to 20 C.F.R. §718.204(b)(2)(iv), that Dr. Simpao's diagnosis of a disabling respiratory impairment was based on invalid objective testing, and thus was not credible, she also could not rely on Dr. Simpao's opinion regarding the cause of the impairment. *Chumley*, slip op. at 9. The Board held that, as the administrative law judge found that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv), the issue is no longer the extent of the disability but, rather, the cause of claimant's total disability. *Id.* Thus, Board held that the administrative law judge did not adequately explain why her determination not to rely on Dr. Simpao's opinion as to the *extent* of claimant's impairment, at 20 C.F.R. §718.204(b)(2)(iv), undermined the physician's separate conclusion that coal mine dust exposure is a "significant contributing factor" to claimant's disabling respiratory impairment. *Id.* Consequently, the Board remanded the case to the administrative law judge for further consideration of all the medical opinions pursuant to 20 C.F.R. §718.204(c). *Chumley*, slip op. at 10.

On remand, the administrative law judge initially noted that, while the Board had affirmed her determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), subsequent to the Board's decision, the United States Court of Appeals for the Sixth Circuit held in *Dixie Fuel Co. v. Director, OWCP [Hensley]*, 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012), that all types of evidence must be weighed together before determining whether claimant suffers from pneumoconiosis. Weighing the relevant evidence together on remand, the administrative law judge found that the negative x-ray evidence did not undercut her prior finding that the medical opinion evidence established the existence of legal pneumoconiosis. The administrative law judge further found that claimant established that her total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's previous findings that the medical opinion evidence established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), and the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Additionally, employer asserts that the administrative law judge erred, on remand, in finding that the evidence, weighed together, established the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Finally, employer contends that the administrative law judge erred in finding that claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contentions that the existence of legal pneumoconiosis and total disability remain as contested issues.

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).

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 she suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *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).

Employer initially reasserts its challenge to the administrative law judge's finding that claimant established, through the reasoned and documented opinion of Dr. Simpao, the existence of legal pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). Employer's Brief at 13-20. Employer also reiterates its challenge to the administrative law judge's finding that claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer's Brief at 20-22. Previously, we rejected employer's allegations of error on these issues, and held that substantial evidence supported the administrative law judge's findings. *Chumley*, slip op. at 3-7. As the Director asserts, the Board's prior holdings constitute the law of the case with regard to these issues, and employer has not shown a basis for an exception to the doctrine. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990). Therefore, we decline to revisit our holdings.

We further reject employer's argument that, on remand, in weighing together all of the evidence relevant to the existence of pneumoconiosis, the administrative law judge "ignor[ed] the bulk of the evidence," including the preponderantly negative x-rays, "in favor of Dr. Simpao's opinion." Employer's Brief at 19. The regulations distinguish between clinical and legal pneumoconiosis, and the administrative law judge must bear the distinction in mind when weighing the medical evidence. See *Hensley*, 700 F.3d at 878, 25 BLR at 2-213; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210-11, 22 BLR 2-162, 2-172-73 (4th Cir. 2000). Thus, a medical opinion that claimant has legal pneumoconiosis is not necessarily inconsistent with the negative x-ray evidence for clinical coal workers' pneumoconiosis. See *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 624-26, 21 BLR 2-654, 2-660-62 (4th Cir. 1999). We therefore reject employer's contention that the administrative law judge was required to discredit the opinion of Dr. Simpao that claimant has legal pneumoconiosis.

Employer next argues that the administrative law judge erred in her analysis of the medical opinion evidence when she found that claimant is totally disabled due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Relevant to the cause of claimant's disability, the administrative law judge reconsidered the opinions of Drs. Simpao, Fino, and Repsher, as instructed by the Board. The administrative law judge found that Dr. Simpao's opinion, attributing claimant's disabling impairment, in part, to coal mine dust exposure, established that pneumoconiosis is a substantially contributing cause of claimant's total disability. The administrative law judge discounted the opinions of Drs. Fino and Repsher, that claimant's disability is not due to coal mine dust exposure, because neither physician diagnosed claimant with legal pneumoconiosis. Decision and Order on Remand at 17.

Employer asserts that Dr. Simpao's opinion, that coal mine dust exposure is a "significant contributing factor" to claimant's respiratory impairment, does not constitute a well-reasoned opinion, sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total disability. Employer's Brief at 22-23. Employer argues further that the administrative law judge erred in her analysis of the opinions of Drs. Fino and Repsher, and that she shifted the burden of proof to employer by requiring Drs. Fino and Repsher to "rebut" the opinion of Dr. Simpao. Employer's Brief at 23-24; Decision and Order on Remand at 18.

Contrary to employer's contention, the administrative law judge permissibly relied on the opinion of Dr. Simpao, that coal mine dust exposure, smoking, and claimant's employment in a sewing factory had all contributed to claimant's disabling impairment, and that the contribution from coal mine dust exposure is "significant," as a reasoned and documented opinion that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).⁵ See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004). Further, the administrative law judge reasonably discredited the opinions of Drs. Fino and Repsher, regarding the cause of claimant's

⁵ The administrative law judge noted that while Dr. Simpao's opinion was based, in part, on invalid objective testing, valid testing performed six weeks later confirmed Dr. Simpao's results. Decision and Order on Remand at 17. The administrative law judge found that Dr. Simpao also based his opinion on claimant's symptoms, her employment and exposure histories, and the results of his physical examination. *Id.* The administrative law judge noted that, in concluding that coal mine dust exposure, cigarette smoking, and employment in a sewing factory had all contributed to, or aggravated, claimant's disabling pulmonary impairment, Dr. Simpao explained that there is no proven procedure to determine the degree of influence of each of these factors. Decision and Order on Remand at 8, 17; Director's Exhibit 13.

disability, because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding.⁶ See *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order on Remand at 17-18.

Finally, contrary to employer's contention, the administrative law judge did not shift the burden of proof to employer to rule out coal mine dust exposure as a cause of claimant's disabling impairment. Employer's Brief at 24. Rather, the administrative law judge properly required claimant to "establish that pneumoconiosis is a 'substantially contributing cause' to her disability." See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515-16, 22 BLR 2-625, 2-651 (6th Cir. 2003); Decision and Order on Remand at 17. Because the administrative law judge, on remand, permissibly found that Dr. Simpao's medical opinion constituted a documented and reasoned opinion "sufficient to establish that coal dust exposure substantially contributed to [claimant's] disability," and permissibly discredited the contrary medical opinions of Drs. Fino and Repsher, we affirm the administrative law judge's determination that claimant met her burden to establish that her totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Gross*, 23 BLR at 1-17-19; Decision and Order on Remand at 17-18.

⁶ The administrative law judge stated, "I can find no specific and persuasive reasons for concluding that Dr. Repsher's and Dr. Fino's judgment that exposure to coal dust did not cause or contribute to the Claimant's impairment did not rest upon their disagreement with my finding that Claimant has legal pneumoconiosis." Decision and Order on Remand at 18.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge