U.S. Department of Labor Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0224 BLA

LARRY DAVID DANIELS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 03/30/2016
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 and Decision and Order on Reconsideration of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order and Decision and Order on Reconsideration (2012-BLA-05547) of Lystra A. Harris (the administrative law judge) awarding benefits on a claim filed on May 9, 2011, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least 16 years in underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(i), (ii), (iv) and 718.204(b)(2) overall. Consequently, the administrative law judge found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge also found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits. The administrative law judge subsequently granted employer's request for reconsideration, but found that employer failed to establish rebuttal of the presumption at Section 411(c)(4). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal. Employer has filed a brief in reply to claimant's response brief, reiterating its prior contentions and requesting the Board to hold an oral argument to address the validity of the administrative law judge's analysis for dismissing the medical opinions of its experts.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more 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 are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[2] We affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) because no party challenges her determinations with respect to the length of claimant's coal mine employment or that claimant suffers from a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.204(b)(2)(i), (ii), (iv) and 718.204(b)(2) overall. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at Section 411(c)(4).[4] Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of clinical and legal pneumoconiosis, or by proving that no part of claimant's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal of the presumption at Section 411(c)(4) by either method.

In addition to acknowledging the superior qualifications of Drs. Jarboe, Dahhan, McCormack and Fernandes,[5] the administrative law judge noted that Drs. McCormack and Fernandes have treated claimant. Nevertheless, the administrative law judge gave little weight to the opinions of Drs. McCormack, Fernandes and Burrell[6] because she found that they were not well-reasoned.[7] The administrative law judge further stated that,

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[3] The record indicates that claimant was last employed in the coal mining industry in Tennessee. Director's Exhibit 3. 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 (1989)(en banc).

[4] We decline employer's request to hold an oral argument to address the validity of the administrative law judge's analysis for dismissing the medical opinions of its experts.

[5] Drs. McCormack and Dahhan are Board-certified in Internal and Pulmonary Medicine, Claimant's Exhibit 3; Employer's Exhibit 1; Dr. Jarboe is Board-certified in Internal Medicine and Pulmonary Disease, Employer's Exhibit 4; and Dr. Fernandes is Board-certified in Internal Medicine, Claimant's Exhibit 1. Dr. Burrell is certified by the American Academy of Family Practice. Director's Exhibit 11.

[6] Dr. McCormack noted that "[claimant] is followed in our office with comorbid pulmonary conditions including components of [chronic obstructive pulmonary disease (COPD)]." Claimant's Exhibit 3. Dr. Fernandes diagnosed pneumoconiosis. Claimant's Exhibit 1. Dr. Burrell opined that claimant has COPD related to coal dust exposure and tobacco abuse. Director's Exhibit 11; Employer's Exhibit 5.

[7] The administrative law judge found that Dr. McCormack's opinion that claimant

"[r]egardless of the weight I give to Drs. McCormack, Fernandes, and Burrell's opinions, I find that these opinions do not aid the [e]mployer in rebutting the [20 C.F.R.] §718.305 presumption."[8] Decision and Order at 26. The administrative law judge then gave little weight to the opinions of Drs. Jarboe and Dahhan[9] because she found that they were not well-reasoned. Additionally, the administrative law judge gave little weight to claimant's treatment records because "they do not state the etiology of [c]laimant's lung disease, and none indicated that coal mine [dust] exposure did not contribute to [c]laimant's impairments."[10] Decision and Order at 27. Hence, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis. On reconsideration, the administrative law judge again found that employer failed to disprove the existence of legal pneumoconiosis.

Employer asserts that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[11] Specifically, employer argues that the

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has COPD and coal workers' pneumoconiosis "is conclusory, poorly reasoned and not adequately supported by documentation." Decision and Order at 25. The administrative law judge also found that "Dr. Fernandes merely states her conclusion that [c]laimant has pneumoconiosis, and that his cardiac disease alone could not explain the severe decline in pulmonary function results, without addressing her rationale or reasoning." *Id*. Further, the administrative law judge found that, "While Dr. Burrell's opinion comports with the legal definition of pneumoconiosis under the regulation [at 20 C.F.R.] §718.201, it is not well reasoned and is conclusory." *Id*.

[8] No party contests the administrative law judge's determination that the opinions of Drs. McCormack, Fernandes and Burrell do not support a finding that employer disproved the existence of legal pneumoconiosis. We, therefore, affirm this unchallenged finding. *See Skrack*, 6 BLR at 1-711.

[9] Dr. Jarboe opined that claimant does not have legal pneumoconiosis. Employer's Exhibits 4, 6. Dr. Jarboe opined that claimant's severe restrictive ventilatory impairment is caused by morbid obesity and chronic congestive heart failure, and not coal dust exposure. *Id*. Similarly, Dr. Dahhan opined that claimant does not have legal pneumoconiosis or any other condition caused by, related to, contributed to, or aggravated by the inhalation of coal mine dust. Employer's Exhibits 1, 7.

[10] As no party challenges the administrative law judge's consideration of claimant's treatment records, we affirm this finding. *See Skrack*, 6 BLR at 1-711.

[11] Although the administrative law judge found that employer established the

administrative law judge erred in discounting Dr. Jarboe's opinion on the ground that it is not well-reasoned. We disagree. It is the province of the administrative law judge to assess the evidence of record and determine if a medical opinion is sufficiently documented and reasoned to satisfy a party's burden of proof. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). In her Decision and Order, the administrative law judge permissibly gave little weight to Dr. Jarboe's opinion because it is not reasoned. *See Clark*, 12 BLR at 1-155. The administrative law judge reasonably found that Dr. Jarboe's opinion that there would be some scarring on the radiographic imaging of claimant's chest if coal dust exposure caused his severe restriction is inconsistent with the Department of Labor's (the Department's) recognition that pneumoconiosis may be diagnosed "notwithstanding a negative x-ray." 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). In addition, the administrative law judge permissibly found that Dr. Jarboe's suggestion that "[c]laimant does not have [chronic obstructive pulmonary disease (COPD)], but that his pulmonary function results over time would indicate bronchial asthma" is inconsistent with the Department's recognition that the "scientific evidence substantially links coal mine dust exposure to COPD, and that COPD includes three disease processes: *asthma*, chronic bronchitis, and emphysema." Decision and Order at 26; *see* 65 Fed. Reg. at 79,939, 79,994 (emphasis added). Further, in her Decision and Order on Reconsideration, the administrative law judge acknowledged that Dr. Jarboe opined that claimant's morbid obesity played a role in his impairment based on an algorithm that correlated claimant's obesity with reduction of FVC and FEV1 values. Decision and Order on Reconsideration at 5. Nevertheless, the administrative law judge reasonably determined that Dr. Jarboe's opinion failed to show that coal mine dust did not aggravate claimant's impairment.[12] *See Kuchwara v. Director, OWCP*, 7

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absence of clinical pneumoconiosis, she found that employer failed to establish the absence of legal pneumoconiosis. Hence, the administrative law judge found that employer failed to disprove the existence of pneumoconiosis under the first prong of rebuttal at 20 C.F.R. §718.305(d)(1)(i).

[12] The administrative law judge determined that "[Dr. Jarboe's opinion] cites inapposite objective medical evidence in support of his opinion that [c]laimant does not have COPD, which includes asthma in its definition." Decision and Order on Reconsideration at 5. Specifically, the administrative law judge stated that Dr. Jarboe noted a marginal reduction of FEV1 value in a pulmonary function study administered by Dr. Burrell and an improvement in airflow for later studies administered by Dr. Dahhan.

BLR 1-167 (1984). We therefore affirm the administrative law judge's finding that Dr. Jarboe's opinion is insufficient to establish the absence of legal pneumoconiosis as supported by substantial evidence.

Employer also argues that the administrative law judge erred in discounting Dr. Dahhan's opinion on the ground that it is not well-reasoned. Employer's assertion has merit. In her Decision and Order and Decision and Order on Reconsideration, the administrative law judge gave less weight to Dr. Dahhan's opinion for failing to explain how he excluded coal dust exposure as a cause of claimant's impairment because the regulations provide that coal dust can cause a restrictive impairment and it need not be the sole cause of that impairment to constitute legal pneumoconiosis. Decision and Order at 26; Decision and Order on Reconsideration at 4. Additionally, the administrative law judge noted that, although "Dr. Dahhan diagnoses a non-parenchymal impairment based on [c]laimant's diminished FVC and FEV1 values…, the regulations do not prescribe that FVC and FEV1 are diagnostic tools for determining the presence or absence of pneumoconiosis." Decision and Order on Reconsideration at 4. The administrative law judge also stated that "Dr. Dahhan does not cite support for his conclusion that pneumoconiosis can be ruled out in the face of equally diminished FVC and FEV1 values, with preserved lung volume." *Id.*

Contrary to the administrative law judge's findings, however, Dr. Dahhan did not rely on either the view that coal mine dust exposure cannot cause a restrictive impairment or the view that coal mine dust exposure cannot cause an impairment based on diminished FVC and FEV1 values, with preserved lung volume. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Instead, Dr. Dahhan relied, in part, on FVC and FEV1 values to find that claimant has a restrictive impairment and the preserved total lung capacity to find that claimant's impairment arose outside of the lungs. Employer's Exhibits 1, 7. Consequently, we cannot affirm the administrative law judge's rationale for discounting Dr. Dahhan's opinion. We therefore vacate the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis and remand the case for further consideration of the medical opinion evidence thereunder. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge also stated that Dr. Jarboe determined that "'[t]his change in function over such a short period of time *certainly would suggest bronchial asthma* and indicate that any airflow obstruction which may have been present was reversible.' EX 4 (emphasis added)." *Id.* Further, the administrative law judge stated that Dr. Jarboe also noted that "[c]laimant gave a history of asthma, and that Dr. Baljepally uses the term 'possible COPD.'" *Id.*

On remand, the administrative law judge should consider whether employer disproved the existence of legal pneumoconiosis by establishing that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). If employer proves that claimant does not have legal and clinical pneumoconiosis, employer has rebutted the presumption at 20 C.F.R. §718.305(d)(1)(i).

Finally, employer asserts that the administrative law judge erred in finding that it failed to prove that pneumoconiosis played no part in claimant's totally disabling respiratory impairment. Employer argues that "it was incumbent on [the administrative law judge] to explain why she did not conclude coal mine dust is ruled out as a factor in pulmonary disability." Employer's Brief at 23. In view of our decision to vacate the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis, we also vacate the administrative law judge's finding that employer failed to establish the second prong of rebuttal at 20 C.F.R. §718.305(d)(1)(ii). If employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that no part of claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis, as defined in 20 C.F.R. §718.201. *Minich*, 25 BLR at 1-158-59.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration awarding benefits are affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge