

BRB No. 10-0489 BLA

CHARLES A. GRACE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	
)	DATE ISSUED: 05/27/2011
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 Award of Benefits of Daniel F. Solomon, 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.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2005-BLA-06291) of Administrative Law Judge Daniel F. Solomon 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).¹ This case is before the Board for the second time. In its prior Decision and Order, the Board vacated the administrative law judge's finding that claimant established 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 20 C.F.R. §718.204(c). *C.A.G. [Grace] v. Peabody Coal Co.*, BRB No. 08-0490 BLA, slip op. at 3-7 (Mar. 30, 2009) (unpub.). However, the Board rejected employer's assertion that the administrative law judge erred in discrediting Dr. Fino's opinion on the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Board remanded the case to the administrative law judge with instructions to reconsider the medical opinions of Drs. Baker, Repsher, and Simpao.² *Id.* at 3-5, 6. On remand, in a Decision and Order issued on May 11, 2010, the administrative law judge found the opinions of Drs. Baker and Simpao sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to 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 did not follow the Board's remand instructions or the requirements of the Administrative Procedure Act (APA),³ 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), in finding the existence of legal pneumoconiosis⁴

¹ We agree with the Director, Office of Workers' Compensation Programs, that the recent amendments, which apply to claims that were filed after January 1, 2005, do not impact this case, as the claim was filed on August 20, 2004. Director's Exhibit 1.

² The Board did not disturb the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) or his acceptance of the parties' stipulations to thirty-three years of coal mine employment and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). *C.A.G. [Grace] v. Peabody Coal Co.*, BRB No. 08-0490 BLA (Mar. 30, 2009) (unpub.).

³ The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

⁴ 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment

established under 20 C.F.R. §718.202(a)(4) and did not apply the correct standard in finding total disability due to pneumoconiosis established under 20 C.F.R. §718.204(c). Employer requests that the Board vacate the award of benefits and remand the case to a different administrative law judge. In response, claimant urges the Board to reject employer's arguments and affirm the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a substantive response in this appeal, unless 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.⁵ 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).

Employer contends that the administrative law judge's findings on remand do not accord with the Board's remand instructions or the APA, as he did not explain his rationale for finding that the diagnoses of legal pneumoconiosis by Drs. Baker and Simpao were reasoned and documented. Employer argues that Dr. Baker's diagnosis of legal pneumoconiosis is not adequately reasoned because he merely indicated that it is presumed that, if a patient has a history of exposure to coal dust, there is a cause and effect relationship between any pulmonary condition and that exposure. Employer further maintains that Dr. Baker's opinion is based on generalities, as evidenced by his statements that claimant's symptoms could be related to coal dust exposure and that his blood gas test results could be caused by an obstructive disease like pneumoconiosis. Employer also argues that the administrative law judge failed to consider whether Dr. Baker's opinion supported a finding that "this specific claimant's chronic obstructive disease was related to coal mine dust exposure" as instructed by the Board. Employer's Brief at 13.

Employer's allegations of error are rejected. Pursuant to the United States Court of Appeals for the Sixth Circuit's holding in *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002), the reviewing authority is required to defer to the administrative law judge's assessment of the credibility of a physician's opinion. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553, citing *Peabody Coal Co. v.*

"significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 2.

Groves, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002) (lacking the authority to make credibility determinations, the court defers to the administrative law judge's findings). In this case, the administrative law judge rationally found that Dr. Baker's diagnosis of legal pneumoconiosis was well-documented and well-reasoned, as Dr. Baker explained his conclusions in detail and identified the evidence supporting his diagnosis. *Id.*

In his written report, Dr. Baker diagnosed simple coal workers' pneumoconiosis due to coal dust exposure, based upon a chest x-ray, and a severe, totally disabling obstructive defect to which coal dust exposure was a contributing cause, based upon the results of his examination of claimant. Claimant's Exhibit 2. Dr. Baker acknowledged in his subsequent deposition that claimant reported a ten pack-year smoking history and stated that claimant's significant coal dust exposure for almost forty years was sufficient to cause a susceptible individual, like claimant, to develop disabling chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 2 at 5-6, 11. Dr. Baker further stated that claimant's symptoms of orthopnea, cough, sputum production, inspiratory and expiratory wheezing and shortness of breath for fifteen years are typically associated with coal workers' pneumoconiosis and that the production of one-half to one cup of sputum per twenty-four hours indicates that claimant has chronic bronchitis. *Id.* at 7-8. Dr. Baker opined that coal dust irritates and makes chronic bronchitis worse and that claimant's smoking history would be insignificant in causing claimant's chronic bronchitis. *Id.* at 11. Dr. Baker explained that medical studies support his conclusion that, although claimant has a ten pack year smoking history, coal dust exposure is "certainly causative or additive to whatever other underlying disease he may have." *Id.* at 12. Based on his examination of claimant, Dr. Baker opined that claimant has clinical and legal pneumoconiosis. *Id.* at 25. Accordingly, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker provided a reasoned and documented diagnosis of legal pneumoconiosis. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order on Remand at 3, 6.

The administrative law judge also rationally found that Dr. Simpao provided a reasoned and documented report that supports Dr. Baker's conclusions. Contrary to employer's contention, the administrative law judge adequately reconsidered Dr. Simpao's opinion and permissibly determined that Dr. Simpao diagnosed an obstructive impairment, identified coal dust exposure as a contributing cause, and explained that the severity of the impairment supported the diagnosis of legal pneumoconiosis. See *Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order on Remand at 3, 6.

Employer also maintains that the administrative law judge cannot rely on the preamble to the amended definition of pneumoconiosis, set forth in 20 C.F.R. §718.201(a)(2), when weighing the medical opinions of record. In the alternative,

employer contends that it was error for the administrative law judge to rely on the comments made by the Department of Labor (DOL) in the preamble to credit the opinions of Drs. Baker and Simpao when neither physician premised his conclusions on the additive effects of cigarette smoking and coal dust exposure.

The preamble to the amended regulations set forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *See J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, F.3d , BLR 2- , 2011 WL 1366355 (3rd Cir 2011). In addition, contrary to employer's assertion, Drs. Baker and Simpao did, in fact, reference the additive effects of claimant's exposure to both coal dust and cigarette smoke. Dr. Baker stated that claimant's coal dust exposure was "certainly causative or additive to whatever other underlying disease" claimant may have. Claimant's Exhibit 1 at 12-13. Dr. Simpao similarly determined that coal dust exposure is the primary cause of claimant's disabling pulmonary impairment, while smoking contributed to a lesser degree. Director's Exhibit 14; Claimant's Exhibit 1 at 11. Accordingly, we hold that the administrative law judge did not err in citing the preamble to the amended regulations when weighing the medical opinions relevant to the issue of legal pneumoconiosis. *Obush*, 24 BLR at 1-125-26; Decision and Order on Remand at 5.

Employer further alleges that the administrative law judge selectively analyzed the medical opinion evidence, as he closely scrutinized the opinions of Drs. Repsher and Fino, while accepting the opinions of Drs. Baker and Simpao at face value. Employer also argues that the administrative law judge merely reiterated the findings that the Board vacated in its prior Decision and Order. Employer's contentions are without merit.

The administrative law judge acted within his discretion as fact-finder in according "less weight" to Dr. Repsher's conclusion, that claimant does not have legal pneumoconiosis, because he did not establish as a "predicate to his opinion that one can distinguish the effects from smoking and mining" and did not "provide any basis for substantiation [of] this assertion in medical literature." Decision and Order on Remand at 5; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. The administrative law judge also rationally accorded less weight to Dr. Repsher's opinion, that claimant's COPD was due solely to smoking, because Dr. Repsher failed to explain how claimant's coal dust exposure could be eliminated as a source of claimant's obstructive impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Decision and Order on Remand at 6. Moreover, the administrative law judge rationally accorded less weight to Dr. Repsher's exclusion of legal pneumoconiosis as an

additional diagnosis, on the ground that his statement, that “coal miners with 0/0 through 3/3 simple pneumoconiosis . . . average loss of FEV1 is so small, that it is not detectable in an individual miner” and is “not a clinically significant presence of COPD,” is not consistent with the Attfield and Hodous study he cited⁶ or the findings accepted by the DOL when drafting the revised definition of legal pneumoconiosis.⁷ 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. at 79,940-1, 943; *see Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; Decision and Order on Remand at 5.

In addition, we reject employer’s argument that the administrative law judge erred in failing to consider whether Dr. Fino’s opinion is supportive of Dr. Repsher’s opinion. The Board previously rejected employer’s assertion that the administrative law judge erred in discrediting Dr. Fino’s opinion on the issue of legal pneumoconiosis at 20 C.F.R. §718.204(a)(4), holding that the administrative law judge properly found that Dr. Fino’s report could not establish the presence or absence of legal pneumoconiosis. *Grace*, BRB No. 08-0490 BLA, slip op. at 5. Because we have affirmed his determination that Dr. Fino’s report could not establish the presence or absence of legal pneumoconiosis, and employer has not set forth a basis for altering the Board’s prior disposition, it now constitutes the law of the case and we decline to disturb it. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BBLR 1-988 (1984).

⁶ The administrative law judge correctly cited to the study by Attfield and Hodous on 7,139 miners who worked both before and after 1970, when the federally-mandated dust control standards were implemented. 65 Fed. Reg. 79,940-41; Decision and Order on Remand at 5. Contrary to employer’s allegation, the Department of Labor (DOL) determined that the study accounted for decrements due to age and smoking history and demonstrated a clear relationship between dust exposure and a decline in FEV1 of about 5 to 9 milliliters per year, even in miners with no radiographic evidence of clinical coal workers’ pneumoconiosis. 65 Fed. Reg. 79,940-41.

⁷ The DOL concluded that “[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. *The risk is additive with cigarette smoking.*” 65 Fed. Reg. at 79,940 (emphasis added). Citing to studies and medical literature reviews conducted by the National Institute for Occupational Safety and Health (NIOSH), the DOL quoted the following from NIOSH:

COPD may be detected from decrements in certain measures of lung function, especially FEV₁ and the ratio of FEV₁/FVC. *Decrement in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present.*

65 Fed. Reg. 79,943 (emphasis added).

Accordingly, we affirm the administrative law judge's finding that the opinions of Drs. Baker and Simpao are sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as it is rational and supported by substantial evidence.⁸ See *Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; Decision and Order on Remand at 3, 6.

Employer also asserts that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) because he applied a standard under which pneumoconiosis "need only be more than a de minimus or infinitesimal factor in the miner's total disability." Employer's Brief at 20. We hold that the administrative law judge's statement that "although pneumoconiosis need only be a 'contributing cause' to the miner's total disability, a claimant must demonstrate that the disease was more than a de minimus or 'infinitesimal' factor in the miner's total disability," represented the correct standard for assessing whether claimant established total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Decision and Order on Remand at 6; see *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). In addition, the administrative law judge acted within his discretion in according less weight to Dr. Repsher's opinion, that coal dust exposure played no role in claimant's disabling pulmonary impairment, because the physician's determination, that claimant does not have legal pneumoconiosis, "carries over to etiology" and is contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 7; see *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003). Similarly, the administrative law judge reasonably determined that Dr. Fino's opinion was entitled to little weight under 20 C.F.R. §718.204(c), as he did not address the issue of legal pneumoconiosis. *Id.*

Because the administrative law judge provided valid rationales for finding the opinions of Drs. Baker and Simpao⁹ sufficient to establish that claimant's total disability

⁸ The administrative law judge also rationally found that the issue of whether legal pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203 was subsumed in his determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). 20 C.F.R. §§718.201(a)(2), 718.203(a); Decision and Order on Remand at 6.

⁹ Employer argues that the administrative law judge did not consider that Dr. Fino disputed Dr. Simpao's interpretation of the pulmonary function studies and the source of the abnormal findings reported by Dr. Simpao on physical examination. Employer's Brief at 21. Employer has mischaracterized Dr. Fino's report. Dr. Fino did not dispute Dr. Simpao's interpretation of the pulmonary function studies. Rather, he noted that the cyanotic lips and nail beds reported by Dr. Simpao cannot be due to low blood oxygen levels, because his blood gas study was normal with a pO₂ of 84. Employer's Exhibit 1.

was due to legal pneumoconiosis, and permissibly accorded less weight to the contrary opinions of Drs. Repsher and Fino, we affirm his finding pursuant to 20 C.F.R. §718.204(c). *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

In Dr. Simpao's deposition testimony, he explained that, in light of claimant's normal blood gas study, the cyanotic changes were due to the "chronicity" and "not the acuteness" of the disease like "some lung . . . damage" or a temperature or chemical change. Director's Exhibit 14; Claimant's Exhibit 1 at 15-16.