



BRB No. 15-0361 BLA

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| RICHARD R. CRUM |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| ROBERT COAL COMPANY |) | |
| |) | |
| and |) | |
| |) | |
| OLD REPUBLIC INSURANCE |) | DATE ISSUED: 05/26/2016 |
| COMPANY, 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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor

Joseph Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-05127) of Administrative Law Judge Larry S. Merck 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 involves a claim filed on September 20, 2010.

After crediting claimant with 8.62 years of coal mine employment,¹ the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis² pursuant to 20 C.F.R. §718.202(a). The administrative law judge, however, found that the medical opinion evidence established the existence of legal pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).⁴ Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the

¹ The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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 (1989) (en banc).

² 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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 Because the administrative law judge credited claimant with less than fifteen years of coal mine employment, claimant is not entitled to the rebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.⁵

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Ammisetty, Klayton, Gallai, Rosenberg, and Jarboe. Drs. Ammisetty, Klayton, and Gallai diagnosed legal pneumoconiosis, in the form of obstructive pulmonary disease due to coal mine dust exposure and cigarette smoking. Director's Exhibit 10; Claimant's Exhibits 1, 2. Conversely, Drs. Rosenberg and Jarboe opined that claimant does not suffer from legal pneumoconiosis. Dr. Rosenberg attributed claimant's obstructive pulmonary disease solely to cigarette smoking, Employer's Exhibit. 7, while Dr. Jarboe opined that claimant's obstructive pulmonary disease was due to both cigarette smoking and asthma. Employer's Exhibit 8.

In weighing the conflicting evidence, the administrative law judge found that the opinions of Drs. Ammisetty, Klayton and Gallai, that claimant has legal pneumoconiosis, were "well-reasoned and well-documented." Decision and Order at 31. Conversely, the administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Jarboe because he found that their opinions were inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. *Id.* at 25-27, 30-31. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. It was within the administrative law judge's discretion to

⁵ We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

rely on the preamble as a guide to assess the credibility of the medical evidence in this case. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011).

We also reject employer's contention that the administrative law judge erred in according less weight to the opinions of Drs. Rosenberg and Jarboe. The administrative law judge correctly noted that Drs. Rosenberg and Jarboe eliminated coal mine dust exposure as a source of claimant's obstructive pulmonary disease, in part, because they found a significant reduction in claimant's FEV1/FVC ratio which, in their opinions, was inconsistent with obstruction due to coal mine dust exposure.⁶ Decision and Order at 25-26, 30; Employer's Exhibits 7, 8. The administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Jarboe because their reasoning for eliminating coal mine dust exposure as a source of claimant's obstructive pulmonary disease is in conflict with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.⁷ *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio*

⁶ In attributing claimant's obstructive pulmonary disease to cigarette smoking instead of coal mine dust exposure, Dr. Rosenberg specifically opined that "when coal mine dust exposure causes obstruction, the general pattern is that of a reduced FEV1, with a symmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved or only mildly reduced." Employer's Exhibit 7 at 8. Specific to claimant's situation, Dr. Rosenberg noted there was an "extreme decline" in his FEV1/FVC ratio, indicating that his obstruction was entirely related to cigarette smoking. *Id.* Dr. Jarboe similarly opined that a "disproportionate reduction of FEV1 compared to FVC is the type of . . . functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." Employer's Exhibit 8 at 9. Dr. Jarboe opined that, in claimant's case, the preservation of the FVC and disproportionate reduction of the FEV1 was "indicative of causation by smoking and/or asthma." *Id.*

⁷ Employer does not challenge the Department of Labor's (DOL's) position as articulated in the regulation's preamble, that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. In order to do so, employer would have to submit "the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute." *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014) (internal quotation marks omitted). Employer has presented no such evidence.

Coal Co. v. Director, OWCP [Sterling], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 26.⁸

We further reject employer's contention that the administrative law judge erred in relying on the opinions of Drs. Ammisetty, Klayton, and Gallai to support a finding of legal pneumoconiosis. Employer specifically argues that the administrative law judge erred in finding that the diagnoses of legal pneumoconiosis made by Drs. Ammisetty, Klayton, and Gallai were sufficiently reasoned. Employer's Brief at 18-21. We disagree. Drs. Ammisetty, Klayton, and Gallai based their diagnoses of legal pneumoconiosis on claimant's coal mine employment and smoking histories, a medical history, a physical examination, and the results of a pulmonary function study. Director's Exhibit 10; Claimant's Exhibits 1, 2. The administrative law judge found that Dr. Ammisetty's opinion, that claimant's obstructive pulmonary disease was due to coal mine dust exposure and cigarette smoking, was "well-reasoned," noting that the doctor based his opinion on both the objective evidence, and claimant's histories of coal mine dust exposure and cigarette smoking. Decision and Order at 14, 31. The administrative law judge found that Dr. Klayton's opinion, that claimant's obstructive pulmonary disease was due to coal mine dust exposure and cigarette smoking, was also well-reasoned, noting that the doctor explained that, given the length of claimant's respective coal mine dust exposure and cigarette smoking histories, there was no way to exclude coal mine dust exposure as a contributory factor. *Id.* at 16, 31. Finally, the administrative law judge found that Dr. Gallai's opinion, that claimant's obstructive pulmonary disease was due to coal mine dust exposure and cigarette smoking, was well-reasoned, noting that the doctor explained that, while he could not apportion how much of claimant's obstructive pulmonary disease was due to coal mine dust exposure and how much was due to cigarette smoking, both exposures contributed to the disease.⁹ Decision and Order at 22,

⁸ Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Rosenberg and Jarboe, any error he may have made in according less weight to their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Rosenberg and Jarboe.

⁹ The administrative law judge considered the significance of the fact that Dr. Gallai initially relied upon the fact that claimant had stopped smoking for ten years at the time of his examination. Decision and Order at 22. However, the administrative law judge noted that Dr. Gallai explained that his diagnosis of legal pneumoconiosis would not change even if claimant had continued smoking cigarettes, explaining that while coal mine dust exposure may not have been the predominant cause of claimant's obstructive

31. We conclude that substantial evidence in the record supports the administrative law judge's determination that the diagnoses of legal pneumoconiosis made by Drs. Ammisetty, Klayton, and Gallai are sufficiently reasoned to establish the existence of legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted the opinions of Drs. Rosenberg and Jarboe because they did not diagnose legal pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 36. Moreover, as the administrative law judge rationally relied on the well-reasoned opinions of Drs. Ammisetty, Klayton, and Gallai to find that claimant established the existence of legal pneumoconiosis, he permissibly found that their opinions establish that claimant is totally disabled due to legal pneumoconiosis.¹⁰ *See Ramage*, 737 F.3d at 1062, 25 BLR at 2-473. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. 718.204(c). We, therefore, affirm the administrative law judge's award of benefits.

pulmonary impairment, it remained a substantially contributing factor. *Id.*; Employer's Exhibit 6 at 49-50.

¹⁰ Drs. Rosenberg and Jarboe agree that claimant's disabling pulmonary impairment was caused by his obstructive pulmonary disease. Employer's Exhibits 7, 8.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge