U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0420 BLA

MARLIN E. ASHLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 05/30/2018
	)	
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.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2011-BLA-06167) of Administrative Law Judge Daniel F. Solomon, rendered on a miner's claim

filed on May 20, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time. In its previous decision, the Board affirmed the parties' stipulation that claimant established total disability and noted that the administrative law judge credited claimant with eleven years of coal mine employment.[1] *Ashley v. Westmoreland Coal Co.*, BRB No. 15-0440 BLA, slip op. at 2 (Aug. 22, 2016) (unpub.). The Board vacated the findings that claimant established the existence of clinical and legal pneumoconiosis, however, holding that the administrative law judge failed to consider the negative CT scan evidence and erred in evaluating the medical opinion evidence. *Id.* at 5-8. Because the administrative law judge relied on his findings on pneumoconiosis to find that claimant established total disability causation, the Board vacated that determination as well. *Id.* at 8-9. The Board therefore remanded the case to the administrative law judge for reconsideration. *Id.* at 9.

On remand, the administrative law judge determined that the CT scan evidence is equivocal and that the medical opinions are sufficient to establish the existence of clinical and legal pneumoconiosis. He also found that claimant established that his totally disabling respiratory impairment is due to pneumoconiosis and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge failed to properly consider the CT scan evidence, and again erred in weighing the medical opinions on the existence of pneumoconiosis and total disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this 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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act

[1] Because claimant did not establish at least fifteen years of underground coal mine employment or employment in conditions substantially similar to those underground, the Board affirmed the administrative law judge's finding that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(i). *Ashley v. Westmoreland Coal Co.*, BRB No. 15-0440 BLA, slip op. at 2 n.1 (Aug. 22, 2016) (unpub.).

[2] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibits 3, 5; Hearing Transcript at 12. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 362 (1965).

To be entitled to benefits under the Act, claimant must establish that: he has pneumoconiosis; his pneumoconiosis arose out of coal mine employment; he has a totally disabling respiratory or pulmonary impairment; and his totally disabling impairment is due to pneumoconiosis. 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 an award of benefits. *See 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. Existence of Pneumoconiosis

A. Clinical Pneumoconiosis

Claimant may establish the existence of clinical pneumoconiosis by: x-rays; autopsies or biopsies; operation of one the presumptions described in 20 C.F.R. §§718.304-306; or a physician's opinion. 20 C.F.R. §718.202(a)(1)-(4). The Board previously affirmed the administrative law judge's determination that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Ashley*, BRB No. 15-0440 BLA, slip op. at 4. On remand, as directed by the Board, the administrative law judge considered two readings of a CT scan dated April 6, 2010 by Drs.

Saadeh and Seaman,[3] and one reading of a CT scan dated June 22, 2012 by Dr. McMurray.[4] Decision and Order on Remand at 3-4; Claimant's Exhibit 1; Employer's Exhibits 7, 9. The administrative law judge determined that the CT scan evidence, as a whole, was flawed and not persuasive as to the presence or absence of clinical pneumoconiosis. Decision and Order on Remand at 4.

Employer argues that the administrative law judge erred in concluding that the CT scan interpretations by Drs. Saadeh and McMurray were equivocal, as each physician knew that coal workers' pneumoconiosis was a concern when reading the scans, but they did not report any findings of clinical pneumoconiosis.

Employer's argument is without merit. The administrative law judge must determine whether an x-ray or CT scan reading that is silent regarding the presence or absence of pneumoconiosis is in fact a negative reading for the disease. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-219 (1984); *see also Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-346 (1985). In this case, we see no error in the administrative

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[3] Dr. Saadeh read the April 6, 2010 CT scan and reported:

> Moderately hyper[-]expanded lungs. Moderate centrilobular emphysematous changes. Biapical mildly asymmetric pleuroparenchymal opacity, probably benign . . . . A region of band-like linear opacities in the right upper lobe with nodularity and tiny calcifications . . . with slight pleural involvement. This is most likely inflammatory in nature, possibl[y] related to remote granulomatous disease. No calcified granulomata in the left lung.
>
> Bilateral lower lobe linear opacities, probably related to scarring from prior infection, both lower lobes. Minimal scarring in the right middle lobe and lingual. Pleural based nodule in the right lower lobe . . . likely benign.

Claimant's Exhibit 1. Dr. Seaman read the same scan as showing no centrilobular and perilymphatic "findings consistent with coal workers' pneumoconiosis." Employer's Exhibit 7. She also observed "[i]rregular nodular/linear right upper lobe opacity may represent scarring. Follow up CT is recommended to document stability of this finding and to exclude a primary lung malignancy." *Id*.

[4] Dr. McMurray indicated that the June 22, 2010 scan showed "moderate diffuse emphysema especially in the upper lobes. There is a stable linear opacity in the right upper lobe extending to the pleura . . . . This has not shown a significant change and is most likely an area of linear fibrosis or scarring." Employer's Exhibit 9.

law judge's determination that the readings by Drs. Saadeh and McMurray were, at best, equivocal regarding the presence or absence of clinical pneumoconiosis, based on the qualified language in their reports and the fact that they were unable to provide a definitive diagnosis pertaining to the etiology of claimant's linear opacities. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order on Remand at 3.

We also disagree with employer that the administrative law judge erred in rejecting Dr. Seaman's opinion as equivocal because she specifically stated that the CT scan was negative for coal workers' pneumoconiosis. Contrary to employer's contention, although Dr. Seaman stated that she saw "no centrilobular and perilymphatic nodules that would be consistent with coal workers' pneumoconiosis," she did not explain why the "irregular right apical opacities" and "an irregular nodular linear/opacity measuring 7mm" were "probably scarring" and not coal workers' pneumoconiosis. Employer's Exhibit 7. The administrative law judge permissibly found that Dr. Seaman's failure to provide a definitive diagnosis regarding the cause of the irregular and linear opacities undermined the credibility of her opinion that the CT scan was not "consistent with coal workers' pneumoconiosis." Decision and Order on Remand at 4-5; *see Justice*, 11 BLR at 1-94; Employer's Exhibit 7. We therefore affirm the administrative law judge's finding that the CT scan evidence is inconclusive as to whether claimant has clinical pneumoconiosis.[5]

In considering the medical opinion evidence, the administrative law judge gave greater weight to the opinions of Drs. Defore, Splan, and Panchal that claimant has clinical pneumoconiosis over the contrary opinions of Drs. Rosenberg and Fino. Decision and Order on Remand at 5-11; Director's Exhibit 10; Claimant's Exhibits 7, 11; Employer's Exhibits 5-6, 11-12. Employer asserts that the CT scan evidence establishes that claimant does not have clinical pneumoconiosis and generally argues that the credentials of Drs. Rosenberg and Fino are superior to the credentials of Drs. Defore, Splan, and Panchal. Employer also alleges that the opinions of Drs. Defore, Splan, and Panchal are not adequately documented, as they did not review the medical treatment records, negative chest x-ray interpretations, or the CT scan evidence in making their diagnoses.

Because we have affirmed the administrative law judge's finding that the CT scan evidence is inconclusive, we affirm the administrative law judge's decision to give little weight to the opinions of Drs. Rosenberg and Dr. Fino, to the extent that they excluded a diagnosis of clinical pneumoconiosis based on that evidence. *Harman Mining Co. v.*

[5] Although employer asserts that CT scans may be considered more accurate than x-rays in diagnosing clinical pneumoconiosis, the administrative law judge rationally concluded that the CT scan evidence in this case does not undercut the positive x-ray evidence.

Director, OWCP [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). The administrative law judge also observed that Dr. Fino's diagnosis of clinical pneumoconiosis was based, in part, on Dr. Fino's interpretation of the September 1, 2010 x-ray. The administrative law judge permissibly gave Dr. Fino's opinion less weight in light of the fact that the September 1, 2010 x-ray was determined by the administrative law judge to be in equipoise and the existence of clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1). *See generally Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 (2002) (en banc); Decision and Order on Remand at 10; 2015 Decision and Order at 10.

Further, we reject employer's argument that the opinions of Drs. Defore, Splan, and Panchal are not reasoned or documented because they allegedly did not rely on "any actual medical basis" to support their diagnoses. Dr. Defore performed the examination for the Department of Labor (DOL) and obtained: claimant's work and medical histories; claimant's current symptoms of cough, sputum production, and wheezing; a chest x-ray and pulmonary function and blood gas studies. Director's Exhibit 10. In forming his opinion, Dr. Splan examined claimant, recorded work and medical histories, and reviewed pulmonary function and blood gas studies, as well as a positive x-ray interpretation by Dr. Alexander. Claimant's Exhibit 7. Similarly, Dr. Panchal considered claimant's coal mine employment and medical histories, examined claimant, and considered pulmonary function and blood gas studies, along with a positive x-ray interpretation by Dr. Crum. Claimant's Exhibit 11. Consequently, we reject employer's argument and affirm the administrative law judge's permissible determination that the opinions of Drs. Defore, Splan, and Panchal support a finding that claimant has clinical pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

In light of the foregoing, we affirm the administrative law judge's finding that claimant established clinical pneumoconiosis at 20 C.F.R. §718.202(a) based on the x-ray evidence and the reasoned and documented medical opinions of Drs. Defore, Splan, and Panchal. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); Decision and Order on Remand at 11.

B. Legal Pneumoconiosis

To establish the existence of legal pneumoconiosis, claimant must demonstrate that he suffers from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The administrative law judge considered the medical opinions of Drs. Defore, Splan, and Panchal, diagnosing legal pneumoconiosis, and the contrary opinions of Drs. Fino and Rosenberg. Decision and Order on Remand at 5-11; Director's Exhibit

10; Claimant's Exhibits 7, 11; Employer's Exhibits 5-6, 11-12. He found that the opinions of Drs. Defore, Splan, and Panchal are sufficient to establish legal pneumoconiosis.[6] Decision and Order on Remand at 11.

Employer contends that the opinions of Drs. Defore, Splan, and Panchal should have been discredited because, according to employer, they relied on limited medical data and were unable to apportion the causes of claimant's respiratory impairment. Employer also argues that the administrative law judge ignored the Board's instruction to refrain from discrediting the opinions of Drs. Fino and Rosenberg for not considering claimant's coal mine employment history, as both physicians were aware of his work history and explained why his respiratory impairment was not due to coal dust exposure.[7]

Contrary to employer's contention, the fact that Drs. Defore, Splan,[8] and Panchal reviewed less data in forming their opinions does not mean that their opinions cannot be credited as reasoned and documented, and sufficient to establish legal pneumoconiosis.[9]

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[6] Although the administrative law judge determined that claimant has clinical pneumoconiosis, we address legal pneumoconiosis because it is relevant to the administrative law judge's findings on total disability causation.

[7] Employer asserts that the administrative law judge failed to consider the physicians' respective credentials, stating "[g]iven the overwhelming disparity in . . . the credentials of the physicians . . . it seems counterproductive and incorrect that [the administrative law judge] decided that [employer's] experts are entitled to 'less weight. . . .'" Employer's Brief at 10. However, employer has not explained how Dr. Rosenberg's and Dr. Fino's credentials undermine the administrative law judge's permissible determination that their opinions were not reasoned or documented, and therefore entitled to diminished weight. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference.").

[8] Employer mischaracterizes the smoking history that Dr. Splan relied on in forming his opinion, stating that Dr. Splan indicated that claimant smoked a pack a day while other physicians relied on a smoking history of one-and-a-half to two packs a day. Employer's Brief at 15. However, Dr. Splan actually stated that claimant "was smoking upwards of a pack a day when he quit smoking[,]" which is not inconsistent with the opinions of the other physicians. Claimant's Exhibit 7.

[9] Based on our prior holding concerning the CT scan evidence, we also reject employer's assertion that the opinions of Drs. Defore, Splan, and Panchal are deficient for failing to consider the CT scan evidence, as the administrative law judge determined that the CT scan evidence is entitled to little weight.

See Stark v. Director, OWCP, 9 BLR 1-36, 1-37 (1986). Rather, it is the duty of the administrative law judge to make findings of fact and to resolve conflicts in the evidence. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Furthermore, because the administrative law judge is the trier-of-fact, courts defer to the administrative law judge's evaluation of the proper weight to accord conflicting medical opinions, provided that it is rational and supported by substantial evidence. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002). In this case, the administrative law judge acted within his discretion in determining that the opinions of Drs. Defore, Splan, and Panchal are supported by the record, claimant's work history, and their examinations of claimant. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); Decision and Order on Remand at 11.

We also reject employer's assertion that the opinions of Drs. Defore, Splan, and Panchal cannot satisfy claimant's burden because they did not identify the specific contribution from coal dust and cigarette smoking. A physician's inability to assign specific percentages of impairment to each causal factor does not render the physician's opinion insufficient to support a finding of legal pneumoconiosis.[10] *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006) ("A refusal to express a diagnosis in categorical terms is candor, not equivocation."); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006) (An administrative law judge can credit an opinion in which the physician cannot establish the precise percentage of obstruction due to smoking and coal dust exposure, as "doctors need not make such particularized findings."); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999) ("[B]oth the meaning of an ambiguous word or phrase and the weight to give the testimony of an uncertain witness are questions for the trier-of-fact."). Consequently, we affirm the administrative law judge's finding that the opinions of Drs. Defore, Splan, and Panchal are sufficient to establish the existence of legal

[10] Dr. Defore concluded that "[t]he etiology of the miner's cardiopulmonary diagnosis is multifactorial. . . . It is impossible to differentiate clinically what contribution is from smoking, his heart disease and coal mining employment, but he does have an abnormal pulmonary function study as well as abnormal response to exercise." Director's Exhibit 10. Dr. Splan stated that the etiology of claimant's impairment "[i]s related to inhalation of coal dust and tobacco smoke." Claimant's Exhibit 7. Dr. Panchal opined that the etiology of claimant's respiratory impairment "[i]s a combination of smoking as well as coal dust exposure, however individual contribution of each cannot be delineated." Claimant's Exhibit 11.

pneumoconiosis.[11] *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Mays*, 176 F.3d at 762 n.10; 21 BLR at 2-603 n.10; *Clark*, 12 BLR at 1-155; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

The administrative law judge also permissibly found the opinions of Drs. Fino and Rosenberg to be unpersuasive because they conflict with the medical science accepted by the DOL in the preamble to the 2001 regulations. Both physicians indicated that coal dust was not a factor in claimant's respiratory impairment because his pulmonary function studies showed a decline in the FEV1/FVC ratio. Employer's Exhibits 5-6; 11 at 30, 32. The administrative law judge reasonably determined that this view conflicts with the statement in the preamble recognizing that coal mine dust exposure can cause clinically significant obstructive lung disease, as reflected in a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. Nov. 29, 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-130; Decision and Order on Remand at 9-10.

Further, we disagree with employer's assertion that the administrative law judge disregarded the Board's directive to refrain from discrediting the opinions of Drs. Fino and Rosenberg based on a failure to account for claimant's coal mine employment history. The administrative law judge clarified that he found that Drs. Fino and Rosenberg did not sufficiently explain why claimant's coal dust exposure could not contribute, in part, to claimant's respiratory impairment. Decision and Order on Remand at 10-11. This is a permissible basis for giving less weight to their opinions. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. Because the administrative law judge provided valid rationales for his weighing of the medical opinion evidence, we affirm his determination that claimant established the existence of legal pneumoconiosis based on the medical opinions of Drs. Splan, Panchal, and Defore. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

[11] We reject employer's contention that the administrative law judge "seemingly misses the understanding that the burden of proof is on the [c]laimant in this case." Employer's Brief at 16. The administrative law judge specifically considered whether the opinions of claimant's physicians were reasoned and documented to establish the existence of legal pneumoconiosis. Decision and Order on Remand at 4-11. Thus, the administrative law judge's analysis reflects a proper understanding of the burden of proof.

C. Total Disability Causation

To establish that he is totally disabled due to pneumoconiosis, claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i),(ii).

The administrative law judge found that claimant established that he is totally disabled due to pneumoconiosis based on the opinions of Drs. Defore, Splan, and Panchal. Decision and Order on Remand at 13. He permissibly determined that their opinions are well reasoned and well documented and sufficient to establish that claimant's totally disabling respiratory impairment is due to pneumoconiosis.[12] *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order on Remand at 13. The administrative law judge also rationally determined that the opinions of Drs. Fino and Rosenberg are entitled to less weight because they did not diagnose either clinical or legal pneumoconiosis, contrary to the administrative law judge's findings that those diseases were established. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order on Remand at 11, 13. We therefore affirm the administrative law judge's determination that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[12] Dr. Defore diagnosed a totally disabling pulmonary impairment and stated that "legal pneumoconiosis . . . largely contribute[d]" to it. Director's Exhibit 10. Dr. Splan diagnosed a totally disabling pulmonary impairment due to chronic obstructive pulmonary disease, which he identified as "statutory pneumoconiosis." Claimant's Exhibit 7. Dr. Panchal stated that claimant is totally disabled "from [a] pulmonary capacity standpoint" and attributed claimant's disability to legal pneumoconiosis. Claimant's Exhibit 11.

Accordingly, the administrative law judge's Decision and Order on Remand Award of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge