U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 17-0098 BLA
and 17-0099 BLA

JANICE F. MULLINS (Widow of and o/b/o LEROY MULLINS)	)	
v.	)	
BIG TEN CORPORATION	)	DATE ISSUED: 11/30/2017
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 Awarding Benefits in Miner's and Survivor's Claims of Carrie Bland, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2011-BLA-05062 and 2013-BLA-05115) of Administrative Law Judge Carrie Bland.[1] Considering the miner's subsequent claim, filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act), the administrative law judge credited the miner with 12.5 years of coal mine employment, based on the parties' stipulation, and accepted employer's concession that the autopsy evidence was sufficient to establish the existence of clinical pneumoconiosis.[2] The administrative law judge further determined that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, and that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). The administrative law judge therefore determined that a change in an applicable condition of entitlement was demonstrated at 20 C.F.R. §725.309 and awarded benefits in the miner's claim.[3]

[1] Claimant in this case is the miner's widow. The miner filed claims for benefits in 1977, 1986, 1993 and 1997, all of which were finally denied. Miner's Claim (MC) Director's Exhibit 1. The miner's fourth claim, filed on January 28, 1997, was denied on August 8, 2000 by Administrative Law Judge Daniel F. Sutton because the miner failed to establish either the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. *Id*. The miner's two requests for modification of this denial were rejected by the district director on March 28, 2001, and May 28, 2002. *Id*. The miner took no further action until he filed a subsequent claim for benefits on September 30, 2009. MC Director's Exhibit 2. In a Proposed Decision and Order dated August 12, 2010, the district director awarded benefits. MC Director's Exhibit 29. Employer requested a hearing, and while the case was pending before the Office of Administrative Law Judges, the miner died on February 24, 2013. Claimant filed a survivor's claim on March 13, 2013. Survivor's Claim Director's Exhibit 1. The miner's claim was remanded to the district director for consolidation with the survivor's claim. MC Director's Exhibit 61.

[2] Because the administrative law judge determined that the miner had less than fifteen years of coal mine employment, 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); *see* 20 C.F.R. §718.305, is not available in either the miner's subsequent claim or the survivor's claim.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative

The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits in the survivor's claim pursuant to Section 422(*l*), Section 932(*l*) (2012).[4] Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer argues that the administrative law judge erred in relying on the preamble to the 2001 regulatory revisions when weighing the medical opinion evidence in the miner's claim and erred in determining that the miner was totally disabled due to legal pneumoconiosis. Employer therefore contends that the Board must vacate the awards of benefits in both claims. The Director, Office of Workers' Compensation Programs, filed a limited brief, asserting that the administrative law judge permissibly consulted the preamble for guidance in evaluating the medical opinions. Claimant has not responded to employer's appeal. Employer filed a reply brief, reiterating its 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,

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law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Administrative Law Judge Sutton denied the miner's most recent prior claim because he failed to prove that he had pneumoconiosis and was totally disabled by it. MC Director's Exhibit 2. To obtain review on the merits of the current subsequent miner's claim, claimant was required to submit new evidence establishing at least one of these elements of entitlement. 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

[4] Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), provides that a survivor of a miner who is determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established: 12.5 years of coal mine employment; that the miner had clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b); and that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.[6] 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).

I. The Miner's Claim

To establish entitlement to benefits in the miner's claim, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that the miner was totally disabled 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. *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).

Employer initially argues that the administrative law judge impermissibly used the preamble to the 2001 regulatory revisions when weighing the evidence relevant to legal pneumoconiosis "to create a presumption that medical opinions attributing a miner's obstructive impairment to cigarette smoking and coal dust exposure are credible, while opinions attributing the obstructive impairment solely to smoking are not." Employer's Brief in Support of Petition for Review at 23. Employer maintains that, contrary to the administrative law judge's findings, Drs. Dahhan and Fino adequately explained why the medical evidence in this case establishes that coal dust exposure was not a causal factor in the miner's obstructive impairment. Employer's contentions are without merit.

Determining the credibility of the medical opinion evidence is a task committed to the administrative law judge in her role as fact-finder. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). When rendering her findings, the administrative law judge is required to address the physicians' qualifications[7] and the extent to which their opinions are reasoned and documented. *See Collins v. J & L Steel*, 21 BLR 1-181, 189 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). In assessing the latter factor, the administrative law judge must consider "the explanations for [the physicians'] conclusions, the documentation

[6] Because the record indicates that the miner's last coal mine employment was in West Virginia, the Board 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); MC Director's Exhibit 4.

[7] The administrative law judge found that each of the physicians who offered an opinion on the existence of legal pneumoconiosis is "well-qualified" as a Board-certified pulmonologist. Decision and Order at 12-13.

underlying their medical judgments, and the sophistication of, and bases for, their diagnoses." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998).

Subsequent to the promulgation of the revised regulations in 2001, the Board and multiple United States Circuit Courts of Appeals have held that an administrative law judge may evaluate expert opinions in conjunction with the discussion by the Department of Labor (DOL) of the prevailing medical science contained in the preamble as part of the deliberative process.[8] *See Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1125-26, 25 BLR 2-581, 2-594-98 (9th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03, 25 BLR 2-203, 2-211-12 (6th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011). Therefore, the administrative law judge permissibly assigned weight to the medical opinions of Drs. Dahhan, Fino, Habre and Al-Khasawneh based, in part, on the extent to which each physician relied on premises consistent with the DOL's resolution of scientific issues set forth in the preamble and the revised regulations. *See Cochran*, 718 F.3d at 324, 25 BLR at 2-265; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012).

The administrative law judge correctly noted Dr. Dahhan cited medical literature reporting that the average annual loss in FEV1 caused by coal dust exposure is significantly lower than the average annual loss experienced by a susceptible smoker.[9] Decision and Order at 13. The administrative law judge reasonably concluded that his

[8] However, mere consistency with the preamble does not equate to a finding that a medical opinion is reasoned and documented. *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002).

[9] Dr. Dahhan reviewed the miner's medical records and concluded that the miner suffered from pneumoconiosis and a totally disabling obstructive impairment caused entirely by his extensive smoking habit. MC Employer's Exhibit 2. Dr. Dahhan identified three factors in support of his exclusion of coal mine dust as a cause of the miner's total disability: 1) the miner's FEV1 loss exceeded the average annual loss of five to nine cubic centimeters attributed to coal dust exposure in the medical literature; 2) the miner's obstruction improved by more than ten percent after the administration of bronchodilators; and 3) the miner's obstructive impairment did not develop until several years after he left the mines. *Id.*; MC Employer's Exhibit 22 at 16, 19-21.

analysis "means that legal pneumoconiosis can never be disabling, which is contrary to the regulations that compensate . . . total disability from a chronic respiratory condition arising out of coal mine employment." *Id.*, *citing* 20 C.F.R. §§718.201(a)(2), 718.204(a); *see Cochran*, 718 F.3d at 324, 25 BLR at 2-265. The administrative law judge also accurately noted that Dr. Dahhan relied, in part, on the fact that the miner's pulmonary impairment developed several years after the miner's coal mine employment ended. Decision and Order at 13; Miner's Claim (MC) Employer's Exhibit 16. The administrative law judge permissibly found Dr. Dahhan's reasoning inconsistent with the DOL's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); 65 Fed.Reg. 79,920, 79,971 (Dec. 20, 2000); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40, 25 BLR 2-675, 685-87 (6th Cir. 2014). In addition, the administrative law judge accurately determined that the credibility of Dr. Dahhan's opinion was diminished by his failure to address "the irreversible component of the miner's obstruction" that remained after the administration of bronchodilators. Decision and Order at 13; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); MC Employer's Exhibits 16, 22 at 11.

The administrative law judge also permissibly found that Dr. Fino's newly submitted medical opinion is entitled to little weight.[10] Decision and Order at 13. Dr. Fino, like Dr. Dahhan, relied in part on the reported statistical difference in the average annual loss in FEV1 attributable to coal dust inhalation and the average annual loss attributable to cigarette smoking, thereby improperly discounting the possibility that coal dust exposure can cause a totally disabling impairment. *See Cochran*, 718 F.3d at 324, 25 BLR at 2-265; Decision and Order at 13; MC Director's Exhibit 40. In addition, the administrative law judge accurately determined that Dr. Fino did not explain why the

[10] Based on his examination of the miner on April 20, 2011, Dr. Fino stated that he had minimal clinical pneumoconiosis and a totally disabling respiratory impairment caused by cigarette smoking. MC Director's Exhibit 40. Dr. Fino identified cigarette smoking as the sole cause of the impairment suffered by the miner, based on the following: the miner's smoking history was nearly three times longer than his coal mine employment history; the pulmonary function studies showed no obstruction from 1985 to 2000 – a period subsequent to the miner's coal mine employment but during which the miner continued to smoke; and the miner had symptoms after 2009 that are traditionally associated with smoking-induced emphysema, including worsening obstruction, elevated lung volumes, and a reduction in diffusing capacity and oxygenation. MC Employer's Exhibit 21 at 22-25.

miner's coal dust exposure was insufficient to have played a role in his impairment. Decision and Order at 14; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). Based on the administrative law judge's permissible credibility findings, we affirm her decision to give little weight to the opinions of Drs. Dahhan and Fino that the miner did not have legal pneumoconiosis. *See Anderson*, 12 BLR at 1-113.

Employer next contends that the administrative law judge erred in relying on the opinions of Drs. Habre and Al-Khasawneh to find legal pneumoconiosis established, as neither physician stated that the miner's respiratory or pulmonary impairment satisfied the definition of legal pneumoconiosis, which requires that the impairment be "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §718.201(b). In addition, employer argues that the administrative law judge erred in crediting their opinions on the ground that they are consistent with the preamble to the 2001 regulatory revisions.

We reject employer's allegation of error regarding the administrative law judge's weighing of Dr. Habre's opinion. Dr. Habre examined the miner on February 28, 2012, and diagnosed clinical pneumoconiosis, chronic obstructive pulmonary disease (COPD) with severe obstruction, coronary artery disease, and hypertension. MC Claimant's Exhibit 3. He attributed the miner's COPD "mainly to his smoking habit." *Id*. With respect to the role coal dust exposure played in the miner's impairment, Dr. Habre concluded:

> [The miner] has a [12.5] year history of confirmed coal mining with high and substantial exposure to high[-]density coal mine dust. . . . Even though smoking remained the major and the primary etiology of his underlying obstructive airflow and respiratory symptoms, coal mine dust has a substantial contributing role and is an important factor in causing his respiratory diagnosis and symptoms.

Id. The administrative law judge rationally found that Dr. Habre's opinion is well-documented because "[h]e conducted a physical examination and performed objective tests [and] . . . reported smoking and coal mine employment histories similar to my findings and noted the [m]iner's symptoms." Decision and Order at 12; *see Collins*, 21 BLR at 1-189. In addition, the administrative law judge permissibly credited Dr. Habre's diagnosis of legal pneumoconiosis as well-reasoned because he explained how the

underlying documentation supported his conclusion.[11] MC Claimant's Exhibit 3. The administrative law judge also noted that Dr. Habre's statement that coal dust played "a substantial contributing role" in the miner's disabling respiratory impairment is consistent with the regulations and the preamble. *Id.*; *see* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cochran*, 718 F.3d at 322-23, 25 BLR at 2-265-2-266 (the administrative law judge properly credited a diagnosis of legal pneumoconiosis where the physician identified coal dust exposure as a significant contributing factor to the miner's COPD/emphysema and explained his conclusion); Decision and Order at 12. We therefore affirm the administrative law judge's decision to credit Dr. Habre's opinion diagnosing legal pneumoconiosis.

The administrative law judge also rationally credited Dr. Al-Khasawneh's diagnosis of COPD related to smoking and coal dust exposure as well-reasoned and well-documented.[12] She accurately noted that Dr. Al-Khasawneh "considered multiple causes for the [m]iner's respiratory impairment," and that he "provided a rationale for his diagnosis" based on "objective test results, symptoms and a consideration of both the smoking and work histories" that was "consistent with the medical science discussed and relied on by the DOL in the preamble to the revised regulations." Decision and Order at 12; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).[13]

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[11] As noted by the administrative law judge, Dr. Habre observed that the miner's pulmonary function study reflected a severe obstructive impairment and that coal dust exposure is a causal factor because the miner's work as a continuous miner operator and roof bolter exposed him to substantial amounts of high density coal dust. Decision and Order at 12; MC Claimant's Exhibit 3.

[12] Dr. Al-Khasawneh examined the miner on December 10, 2009, at the request of the DOL, and diagnosed clinical pneumoconiosis, a severe obstructive impairment, severe hypoxemia, and coronary artery disease. MC Director's Exhibit 11. Dr. Al-Khasawneh stated that the causes of the miner's obstruction and hypoxemia were "his tobacco abuse and his current smoking history[,] as well as coal dust exposure during coal mine employment. . . . Definitely coal dust exposure has aggravated his clinical pneumoconiosis and his [chronic obstructive pulmonary disease (COPD)] in addition to the smoking." *Id.*

[13] Nevertheless, we agree with employer that the administrative law judge erred in failing to make a finding as to whether Dr. Al-Khasawneh's statement that coal dust exposure "aggravated" the miner's COPD satisfies the definition of legal pneumoconiosis as an impairment "significantly related to, or *substantially* aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b) (emphasis added); *see*

Accordingly, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.204(a), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c).[14] Decision and Order at 14; *see White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). We further affirm the administrative law judge's determination that when considered as a whole, the evidence submitted with the miner's prior claims and the evidence submitted with the present subsequent claim are sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 208-09, 22 BLR at 2-169-70; Decision and Order at 15.

Employer next contends that the administrative law judge's errors in finding legal pneumoconiosis established affected her weighing of the medical opinion evidence on the issue of disability causation pursuant to 20 C.F.R. §718.204(c). Employer's Brief in Support of Petition for Review at 29. This argument is without merit. Because we have rejected employer's allegations of error regarding the administrative law judge's determination that the miner had legal pneumoconiosis, employer has not identified a valid basis for vacating the administrative law judge's finding that the miner was totally disabled due to legal pneumoconiosis. Decision and Order at 15-16. Consequently, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c) and further affirm the award of benefits in the miner's claim.

Compton v. Island Creek Coal Co., 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); MC Director's Exhibit 11; Decision and Order at 12, 14. This error is harmless, however, as the administrative law judge's finding of legal pneumoconiosis is supported by substantial evidence in the form of Dr. Habre's credited diagnosis of legal pneumoconiosis, and Dr. Al-Khasawneh's credited diagnosis of COPD, aggravated by coal dust exposure, which corroborates Dr. Habre's opinion. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). Moreover, based on the administrative law judge's permissible discrediting of the opinions of Drs. Dahhan and Fino, there are no reasoned medical opinions that conflict with Dr. Habre's diagnosis of legal pneumoconiosis.

[14] A finding of legal pneumoconiosis at 20 C.F.R. §718.202(a) subsumes a finding that the legal pneumoconiosis arose out of coal mine employment, as required under 20 C.F.R. §718.203. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159 n.18 (2006).

II. Survivor's Claim

In light of our affirmance of the award of benefits in the miner's claim, we hold that in the survivor's claim, the administrative law judge correctly determined that claimant meets the prerequisites for application of Section 422(*l*), 30 U.S.C. §932(*l*), as: she filed her survivor's claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. Decision and Order at 17. We affirm therefore the administrative law judge's finding that claimant has demonstrated her automatic entitlement to benefits under Section 422(*l*). *See Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge