

BRB No. 11-0109 BLA

CHARLES HILL)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BLAZING SADDLES COAL)	DATE ISSUED: 10/24/2011
CORPORATION)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
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 on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2004-BLA-06594) of Administrative Law Judge Donald W. Mosser awarding benefits 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. Claimant filed his claim for benefits on August 13, 2003. Director's Exhibit 2. In a Decision and Order issued on October 3, 2008, the administrative law judge credited claimant with at least twenty-nine years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of legal pneumoconiosis² arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b), and that he is totally disabled due to pneumoconiosis at 20 C.F.R. §§718.204(b)(2), 718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remanded the case for reconsideration of the medical opinion evidence. *C.H. [Hill] v. Blazing Saddles Coal Corp.*, BRB No. 09-0150 BLA (Sept. 23, 2009)(unpub.).³ The Board also vacated the administrative law judge's findings at 20 C.F.R. §718.204(c) and instructed the administrative law judge to reconsider the issue of disability causation, if reached.⁴ In addition, the Board directed the administrative law judge to render a finding regarding claimant's smoking history.

On remand, the administrative law judge initially determined that claimant had a forty-four pack-year smoking history. Upon reconsidering the medical opinion evidence,

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, and apply to claims filed after January 1, 2005, are not applicable to this claim, as it was filed prior to January 1, 2005. Director's Exhibit 2.

² "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

³ The Board affirmed the administrative law judge's decision to discredit Dr. Wicker's opinion, that claimant does not have pneumoconiosis, as that determination was unchallenged on appeal. *See C.H. [Hill] v. Blazing Saddles Coal Corp.*, BRB No. 09-0150 BLA, slip op. at 3 n.5 (Sept. 23, 2009)(unpub.).

⁴ The Board affirmed the administrative law judge's unchallenged finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b). *Hill*, BRB No. 09-0150 BLA, slip op. at 2 n.3.

the administrative law judge discredited the opinions in which Drs. Fino and Dahhan ruled out the presence of pneumoconiosis in any form. The administrative law judge further found, however, that the opinions of Drs. Cohen and Alam, that claimant has chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure were sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also determined that the opinions of Drs. Cohen and Alam were sufficient to establish that claimant's disabling respiratory impairment is due, in part, to his legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c). Employer contends that the administrative law judge applied "an improper standard to assess the evidence on remand." Employer's Brief in Support of Petition for Review (Employer's Brief) at 14. Employer further assigns error to the administrative law judge's weighing of the medical opinions in light of the scientific views endorsed by the Department of Labor (DOL) in the preamble to the revised regulations. Employer maintains that Dr. Cohen's opinion is legally insufficient to satisfy claimant's burden of proving both the existence of legal pneumoconiosis and disability causation. Employer also argues that the administrative law judge, while not requiring Dr. Cohen to establish a causal link between claimant's coal dust exposure and his pulmonary impairment, inconsistently required employer's experts to rule out coal dust exposure as a causal factor in the miner's respiratory condition. *Id.* at 24-25. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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.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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See*

⁵ The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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, 1-202 (1989)(*en banc*).

20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *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).

Legal Pneumoconiosis

The administrative law judge determined that Dr. Cohen's opinion diagnosing legal pneumoconiosis was the "most convincing" and, therefore, was sufficient to satisfy claimant's burden under 20 C.F.R. §718.202(a)(4).⁶ Decision and Order on Remand at 6; Claimant's Exhibit 3. In contrast, the administrative law judge determined that the contrary opinions of Drs. Fino⁷ and Dahhan⁸ were not well-reasoned, because they were based on premises contrary to the regulations. Decision and Order on Remand at 6; Employer's Exhibits 1, 3, 5, 6, 12-15, 18.

Initially, we reject employer's assertion that the administrative law judge erred in referring to the preamble to the amended regulations when weighing the medical opinions relevant to 20 C.F.R. §718.202(a)(4). In evaluating the expert opinions of record, in conjunction with DOL's discussion of the medical science cited in the preamble to the amended regulations, the administrative law judge did not improperly treat the preamble as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis. Contrary to employer's assertion, it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles accepted by DOL and to consider the preamble to the revised regulations in assessing the credibility of the medical experts in this case. *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, 24 BLR 2-369 (3d Cir. 2011); *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Lewis Coal Co. v. Director, OWCP [McCoy]*, 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004).

⁶ Dr. Cohen, in a medical report dated March 4, 2005, opined that claimant's chronic obstructive pulmonary disease (COPD) is due to both coal mine dust exposure and smoking. Claimant's Exhibit 3 at 11.

⁷ Dr. Fino opined, in his medical report dated June 23, 2004, in depositions taken on October 5, 2004 and September 26, 2006, and in his supplemental medical reports dated February 8, 2006 and August 22, 2006, that claimant's COPD is due entirely to smoking. Employer's Exhibits 5 at 12, 8 at 15, 12 at 5, 13 at 13, 18.

⁸ Dr. Dahhan, in a medical report dated October 23, 2003, in a deposition taken on September 14, 2004, and in supplemental medical reports dated August 8, 2006 and September 27, 2006, opined that claimant's COPD is due to smoking. Employer's Exhibits 1 at 3, 6 at 11, 14, 15.

We also reject employer's contention that the administrative law judge erred in determining that Dr. Cohen's opinion was sufficient to establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). The administrative law judge found that Dr. Cohen attributed claimant's impairment to smoking and coal mine dust exposure, based on claimant's twenty-nine years of coal mine employment and his "significant" smoking history, after considering claimant's symptoms, medical, smoking and employment histories, x-rays and pulmonary function studies, and the medical records and reports prepared by Drs. Alam, Fino, Dahhan, Wicker and Caffrey, which the administrative law judge determined "gave him the best picture of [claimant's] complete medical condition." Decision and Order on Remand at 7; Claimant's Exhibit 3. As noted by the administrative law judge, Dr. Cohen indicated that "these two factors are known to cause or contribute to an obstructive impairment, and did so in this case." Decision and Order on Remand at 7.

Contrary to employer's arguments, having specifically considered these aspects of Dr. Cohen's opinion, the administrative law judge permissibly credited Dr. Cohen's opinion as well-reasoned and well-documented and consistent with the scientific premises underlying the regulations that both coal mine dust-induced and cigarette-smoke-induced obstructive impairments occur through similar mechanisms. See 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. Nov. 29, 2007)(unpub.); *Obush*, 24 BLR at 1-125-26; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order on Remand at 8; Claimant's Exhibit 3. Consequently, we affirm the administrative law judge's determination to credit Dr. Cohen's diagnosis of legal pneumoconiosis, as adequately explained and supported by substantial evidence. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

We further reject employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Fino and Dahhan. With regard to Dr. Fino's opinion, the administrative law judge noted that, in explaining the basis for his determination that claimant does not have legal pneumoconiosis, Dr. Fino cited studies indicating that the relationship between coal dust exposure and emphysema was stronger if clinical pneumoconiosis was present. Decision and Order on Remand at 9. The administrative law judge rationally concluded that Dr. Fino's reliance on these studies indicated that he ruled out coal mine dust exposure as a factor in claimant's impairment based, in part, on his view that the presence of legal pneumoconiosis is tied to the degree of clinical pneumoconiosis that is present. See *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26; Decision and Order on Remand at 8-9; Employer's Exhibits 5, 8, 12, 13, 18. Thus, the administrative law judge acted within his discretion in according less weight to Dr. Fino's opinion, as contrary to the views accepted by DOL. Decision and

Order at 17; 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

The administrative law judge assigned less weight to the medical opinion of Dr. Dahhan, in part, because Dr. Dahhan “explained that in the absence of radiological findings and pathological findings, it would be rare for an airway obstruction to cause a disabling impairment,” contrary to DOL’s recognition that coal dust can contribute significantly to a miner’s obstructive lung disease, independent of clinical pneumoconiosis. Decision and Order on Remand at 9; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000)(noting that “[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis]”); *Obush*, 24 BLR at 1-125-26. Thus, the administrative law judge permissibly concluded that Dr. Dahhan did not provide an adequate explanation for his conclusion, that cigarette smoking was the sole cause of claimant’s impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; Decision and Order on Remand at 17. We, therefore, affirm the administrative law judge’s finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total Disability Due to Legal Pneumoconiosis

In considering the cause of claimant’s disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c), the administrative law judge weighed the medical opinions of Drs. Cohen, Alam, Fino and Dahhan and determined that the opinions of Drs. Cohen and Alam were sufficient to satisfy claimant’s burden. Decision and Order on Remand at 12. Contrary to employer’s contention, the administrative law judge properly accorded controlling weight to the opinion of Dr. Cohen, as supported by the opinion of Dr. Alam, because they were the only physicians to opine that claimant’s COPD is due, in part, to coal mine dust exposure, in accordance with the administrative law judge’s finding of legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac’d sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev’d on other grounds*, *Skukan v. Consolidation Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 825-26, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *V.M. [Matney] v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008); Decision and Order on Remand at 13-14. 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), based on the credible opinion of Dr. Cohen, as supported by the opinion of Dr. Alam. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647; *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); Decision and Order on Remand at 14.

Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that he is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's award of benefits.

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

REGINA C. McGRANERY
Administrative Appeals Judge