BRB No. 11-0146 BLA

BOBBY D. BRANHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRANHAM & BAKER COAL COMPANY	)	
	)	
and	)	
	)	
GENERAL RECOVERY, INCORPORATED	)	DATE ISSUED: 10/28/2011
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

James W. Herald, III (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-5200) of Administrative Law Judge John P. Sellers, III, awarding benefits on a claim filed on January 9, 2003, 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 the initial decision, Administrative Law Judge Thomas F. Phalen, Jr., credited claimant with 13.60 years of coal mine employment,[2] and found that, while claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), he failed to establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Phalen denied benefits.

Pursuant to claimant's appeal, the Board vacated the denial of benefits. Initially, the Board held that Judge Phalen did not explain why a thirteen-year period of employment, with which he had credited claimant, was omitted from his finding of the total length of claimant's coal mine employment. *B.D.B.* [*Branham*] *v. Branham & Baker Coal Co.,* BRB No. 08-0676 BLA, slip op. at 5 (June 24, 2009)(unpub.). Since it was unclear from Judge Phalen's analysis whether he found that any of claimant's thirteen years of employment with Mountain Pipeline constituted qualifying coal mine employment, the Board remanded the case for Judge Phalen to reconsider the length of coal mine employment issue. *Id*. at 5-6. Regarding the merits of entitlement, the Board held that substantial evidence did not support Judge Phalen's explanations for discrediting the medical opinions of Drs. Baker and Mettu, diagnosing claimant with pneumoconiosis, or for crediting Dr. Dahhan's contrary opinion, that claimant suffers from a chronic respiratory impairment that is due solely to smoking. *Id*. at 6-10. Accordingly, the Board remanded the case for Judge Phalen to reconsider whether the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, if reached, to determine whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[3] *Id*. at 11.

On remand, due to Judge Phalen's retirement, the case was reassigned, without objection, to Administrative Law Judge John P. Sellers, III (the administrative law

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[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as it involves a claim filed before January 1, 2005.

[2] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 4, 6, 7. Accordingly, the Board will apply the law 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*).

[3] The Board affirmed the finding that claimant established total disability pursuant to 20 C.F.R §718.204(b)(2). *B.D.B.* [*Branham*] *v. Branham & Baker Coal Co.,* BRB No. 08-0676 BLA, slip op. at 3 n.2 (June 24, 2009)(unpub.).

judge). The administrative law judge found that claimant's thirteen years of coal mine construction work with Mountain Coal constituted qualifying coal mine employment. He therefore credited claimant with a total of approximately twenty-six years of coal mine employment. Decision and Order on Remand at 5. The administrative law judge further found that the weight of the credible medical opinion evidence established the existence of legal pneumoconiosis,[4] in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, pursuant to Section 718.202(a)(4). *See* 20 C.F.R. §718.201(a)(2),(b). The administrative law judge further found that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his length of coal mine employment determination. Employer also contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant established the existence of legal pneumoconiosis and total disability due to pneumoconiosis pursuant to Sections 718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response to employer's 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Length of Coal Mine Employment

Employer contends that the administrative law judge erred in finding claimant's employment with Mountain Pipeline, from 1981-1994, to be qualifying coal mine employment. Employer first argues that it was "inappropriate" for the administrative law judge to evaluate claimant's testimony and make a determination on the coal mine employment issue, when Judge Phalen conducted the hearing. Employer's Brief at 8. This argument lacks merit. As noted earlier, on remand, Judge Phalen was no longer

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

available with the Office of Administrative Law Judges, and the case was reassigned, without objection, to the current administrative law judge.

Second, employer argues that claimant's work with Mountain Pipeline cannot be considered coal mine employment, because claimant's construction work at strip mines took place only before or after the strip mining was done. *Id.* at 8-9. We disagree.

The definition of "miner" includes "any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a). Construction workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted by evidence demonstrating that a worker was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility, or that the worker did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii). Thus, contrary to employer's argument, coal mine construction work need not occur during the extraction or preparation of coal to be considered qualifying coal mine employment.

The administrative law judge found that claimant performed coal mine construction work as a welder at strip mine sites for Mountain Pipeline, cutting and replacing gas pipelines.[5] Decision and Order on Remand at 4-5. The administrative law judge, therefore, presumed that claimant was exposed to coal mine dust during that time period. *Id.*; *see* 20 C.F.R. §725.202(b)(1). The administrative law judge further found that employer presented "no evidence to rebut this presumption." Decision and Order on Remand at 5. The administrative law judge, therefore, found that claimant worked as a miner for Mountain Pipeline and that, thus, his thirteen years with the company constituted qualifying coal mine employment.

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[5] The administrative law judge based his finding on claimant's uncontradicted testimony that he performed the same type of work as a welder for Mountain Pipeline between 1981 and 1994 that he performed for B & B Engineers from 1975 to 1979. Decision and Order on Remand at 4; Director's Exhibit 19 at 13, 14, 30; Hearing Transcript at 30. As summarized by the administrative law judge, this work took place at or around strip mines, many of which were owned by employer, and it required claimant to cut apart existing gas lines, to move or replace them so that strip mining could be done, and to run equipment. *Id.*

The administrative law judge's analysis was proper, and substantial evidence supports his finding that claimant's thirteen years of construction work for Mountain Pipeline constituted qualifying coal mine employment. *See* 20 C.F.R. §725.202(b). Adding those thirteen years to claimant's remaining years of qualifying coal mine employment,[6] the administrative law judge credited claimant with approximately twenty-six years of coal mine employment. The administrative law judge's method of calculating claimant's coal mine employment was reasonable, *see Dawson v. Old Ben Coal Co.,* 11 BLR 1-58, 1-60 (1988), and his finding is supported by substantial evidence. *Vickery v. Director, OWCP,* 8 BLR 1-430 (1986). The finding is therefore affirmed.

Merits of Entitlement

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *Anderson v. Valley Camp of Utah, Inc*. 12 BLR 1-111, 1-112 (1989).

With respect to the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Mettu, Baker, Dahhan and Broudy, each of whom is Board-certified in Internal Medicine and Pulmonary Disease. All of the physicians diagnosed claimant with COPD. Drs. Baker and Mettu opined that coal mine dust exposure contributed to claimant's impairment, while Drs. Dahhan and Broudy concluded that claimant's impairment is due solely to smoking, and is unrelated to coal mine dust exposure. Director's Exhibits 11, 15, 17; Claimant's Exhibits 3, 4, 7; Employer's Exhibits 1, 3, 4, 6, 7, 9.

The administrative law judge discussed the opinions of Drs. Mettu and Baker, in light of claimant's coal mine employment and smoking histories,[7] and in light of the

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[6] The administrative law judge credited claimant with 4.1 years of qualifying coal mine employment between 1975 and 1979, another eight years of coal mine employment with employer between 1994 and 2002, and one year of coal mine employment that claimant performed at the age of sixteen. Decision and Order on Remand at 5. Employer does not challenge these findings on appeal. They are therefore affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[7] In evaluating the medical opinion evidence, the administrative law judge adopted Judge Phalen's finding that claimant had a twenty-seven pack-year smoking history, as that finding was not challenged on appeal to the Board. Decision and Order on Remand at 20.

physicians' reasoning for their opinions. Decision and Order on Remand at 20-22. He found both opinions to be reasoned medical judgments of Board-certified pulmonologists that claimant's coal mine dust exposure "had a significant additive effect on his obstructive impairment, although smoking was the primary cause." Decision and Order on Remand at 22. In contrast, he found that, despite the qualifications of Drs. Broudy and Dahhan, their opinions, that claimant's coal mine dust exposure had no significant effect on his COPD, merited less weight. Specifically, he found that Dr. Broudy relied on a coal mine employment history of eight to ten years in reaching his opinion on the etiology of claimant's COPD, a history that the administrative law judge noted was "less than half of the 26 years of coal mine employment which I have found." Decision and Order on Remand at 24. Further, the administrative law judge found that Dr. Broudy relied on the obstructive nature of claimant's impairment as a reason to conclude that it is unrelated to coal mine dust exposure, when the Department of Labor amended the definition of pneumoconiosis to include obstructive diseases arising out of coal mine dust exposure. Decision and Order on Remand at 23. Additionally, the administrative law judge found that Dr. Dahhan did not adequately explain his opinions that claimant's response to bronchodilator medication is inconsistent with a coal mine dust-related condition, and that coal mine dust does not cause a severe obstructive impairment, unless complicated pneumoconiosis or progressive massive fibrosis is present. Weighing the medical opinions together, the administrative law judge found that the opinions of Drs. Baker and Mettu, diagnosing legal pneumoconiosis, outweighed the contrary opinions of Drs. Broudy and Dahhan.

Employer contends that the administrative law judge erred in departing from Judge Phalen's prior credibility determinations regarding the medical opinions. Employer's Brief at 9. Contrary to employer's contention, the administrative law judge, on remand, was not bound by prior findings that were vacated by the Board. *See Bartley v. L&M Coal Co.,* 901 F.2d 1311, 1313, 13 BLR 2-414, 2-417 (6th Cir. 1990); *Lane v. Union Carbide Corp.,* 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); *Dale v. Wilder Coal Co.,* 8 BLR 1-119, 1-120 (1985).

Employer argues generally that the administrative law judge erred in relying upon the opinions of Drs. Baker and Mettu. Employer's Brief at 9, 12. Whether a physician's opinion is adequately documented and reasoned is committed to the discretion of the administrative law judge. *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*). Upon review, we conclude that substantial evidence supports the administrative law judge's discretionary determination that the opinions of Drs. Baker and Mettu were documented and reasoned diagnoses of legal pneumoconiosis, which therefore merited "substantial weight," and had to be weighed against the contrary opinions of Drs. Broudy and Dahhan. Decision and Order on Remand at 22; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Broudy and Dahhan, because his analysis was based on "generalities," rather than the physicians' "particularized evaluation" of claimant. Employer's Brief at 10. We disagree.

The administrative law judge permissibly accorded less weight to Dr. Broudy's opinion because, as the administrative law judge found, Dr. Broudy relied on a coal mine employment history that was less than half the twenty-six years of coal mine employment that the administrative law judge found established. *See Addison v. Director, OWCP,* 11 BLR 1-68, 1-70 (1988). Additionally, the administrative law judge reasonably discounted Dr. Broudy's opinion, that claimant's obstructive lung disease is unrelated to coal mine employment because coal mine dust exposure usually causes a restrictive impairment, as contrary to the medical science accepted by the Department of Labor, when it amended the definition of pneumoconiosis to include both chronic obstructive and restrictive diseases arising out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2), *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. 2007); *J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). As the administrative law judge's reasons for discounting Dr. Broudy's opinion are rational and supported by substantial evidence, those findings are affirmed. *See Anderson*, 12 BLR at 1-113.

Further, the administrative law judge accurately noted that Dr. Dahhan relied, in part, on the partial reversibility of claimant's severe obstructive impairment after bronchodilator administration, to determine that his COPD is unrelated to coal mine dust exposure. The administrative law judge found, as was within his discretion, that Dr. Dahhan did not adequately explain why claimant's response to bronchodilators necessarily eliminated a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Additionally, the administrative law judge permissibly found that Dr. Dahhan did not adequately explain why claimant's twenty-six years of coal mine dust exposure did not contribute to, or aggravate, his COPD, along with his smoking.[8] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We therefore affirm, as supported by substantial

[8] As was highlighted by the administrative law judge, Dr. Dahhan opined that claimant's "pulmonary impairment is severe and disabling, a finding that is not seen secondary to the inhalation of coal dust per se, and [he] has . . . no evidence of complicated coal workers' pneumoconiosis or progressive massive fibrosis that could cause a secondary obstructive abnormality." Employer's Exhibit 3 at 3.

evidence, the administrative law judge's decision to accord less weight to Dr. Dahhan's opinion.

Based on the foregoing discussion, we affirm the administrative law judge's determination that "the weight of the credible medical-opinion evidence establishes the presence of legal pneumoconiosis," pursuant to Section 718.202(a)(4). Decision and Order on Remand at 25.

Pursuant to Section 718.204(c), for the same reasons it raised with respect to the administrative law judge's finding of legal pneumoconiosis, employer contends that the administrative law judge erred in finding that claimant's legal pneumoconiosis is a substantially contributing cause of his total disability. Employer's Brief at 9-12. Contrary to employer's contention, the administrative law judge permissibly relied on the opinions of Drs. Baker and Mettu, that claimant is totally disabled due to legal pneumoconiosis, because he found that they were adequately based on objective studies and claimant's medical and work histories, and because Drs. Baker and Mettu adequately explained why both smoking and coal mine dust exposure contributed to claimant's disabling impairment. *See Barrett,* 478 F.3d at 356-57, 23 BLR at 2-484-85; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, the administrative law judge permissibly found that the contrary opinions of Drs. Broudy and Dahhan merited less weight as to disability causation, because they were not well reasoned as to the existence of legal pneumoconiosis. *See Peabody Coal Co. v. Smith,* 127 F.3d 504, 507, 21 BLR 2-180, 1-185-86 (6th Cir. 1997); *Adams v. Director, OWCP,* 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). We therefore affirm the administrative law judge's finding pursuant to Section 718.204(c), and we affirm the award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge