BRB No. 11-0193 BLA

WALLACE P. LUNSFORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARLAN CUMBERLAND COAL COMPANY	)	DATE ISSUED: 10/28/2011
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

H. Kent Hendrickson (Rice Hendrickson & Williams), Harlan, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-05566) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed on May 16, 2005, 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). Claimant requested that the administrative law judge base his decision on the evidentiary record, without a formal hearing. The administrative law judge granted claimant's request and, by Order dated October 1, 2009,

he admitted the parties' exhibits into evidence. The administrative law judge subsequently notified the parties of recent amendments to the Act, which potentially applied to claims filed after January 1, 2005 and pending on, or after, March 23, 2010. The administrative law judge allowed the parties to submit position statements and supplemental evidence to address the amendments.

In his Decision and Order, the administrative law judge credited claimant with 18.39 years of coal mine employment, based on claimant's Social Security records and Employment History forms. The administrative law judge further found, however, that claimant did not establish that conditions at the coal preparation plant where he worked were substantially similar to conditions in an underground mine. Therefore, the administrative law judge determined that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4).[1]

Considering the claim on the merits, the administrative law judge found that claimant established the existence of legal pneumoconiosis[2] arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a) (4), and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in rejecting the opinions in which Drs. Dahhan and Jarvis ruled out the presence of legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declines to file a substantive response unless specifically requested to do so by the Board.[3]

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[1] Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.SC. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

[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).

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of 18.39 years of coal mine employment and that claimant established

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.[4] 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 under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Simpao, Sellers, Jarvis and Dahhan. Dr. Simpao diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), due to coal dust exposure, based on Dr. Westerfield's x-ray finding of COPD, claimant's symptoms, the physical examination findings, a pulmonary function test and a negative smoking history. Director's Exhibit 36. Dr. Sellers diagnosed coal workers' pneumoconiosis with obstruction in lung function, based on a physical examination, claimant's symptoms, a finding of hyperinflated lungs on x-ray, the results of claimant's pulmonary function and blood gas studies, and the fact that claimant is a non-smoker. Director's Exhibit 16. Dr. Jarvis opined that claimant has no "appreciable pulmonary disease," based on the lack of a smoking history, normal physical examination, a CT scan, an x-ray, and normal pulmonary function and blood gas studies. Director's Exhibit 17. Dr. Dahhan prepared a consultative medical report, based on his review of the medical examinations of Drs. Jarvis and Seller. Dr. Dahhan concluded that there is no evidence of clinical or legal pneumoconiosis and that claimant's totally disabling obstructive impairment, as reflected in his October 13, 2005 pulmonary function test, did not result from inhalation of coal mine dust or coal workers' pneumoconiosis. Employer's Exhibit 5.

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total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

The administrative law judge found that, with the exception of Dr. Jarvis, the experts of record agreed that claimant suffers from an obstructive pulmonary impairment, but disagreed as to the etiology of the disease. Decision and Order at 15. The administrative law judge concluded that Dr. Simpao's determination, that claimant's COPD was caused by coal dust exposure, was entitled to great weight, as Dr. Simpao's opinion was well-documented and well-reasoned and consistent with the endorsement by the Department of Labor (DOL) of the view that coal dust exposure can cause obstructive lung disease and emphysema, in the absence of x-ray evidence of pneumoconiosis. *Id*. at 15-16. The administrative law judge also gave additional weight to Dr. Simpao's opinion, because he performed the most recent examination of claimant. *Id*. at 16. The administrative law judge discredited Dr. Sellers's opinion in light of his reliance on an inflated coal mine employment history and his failure to identify a basis for his diagnosis of pneumoconiosis, with obstruction. *Id*. at 17. The administrative law judge gave little weight to Dr. Jarvis's opinion, as he did not review the x-ray evidence consistent with a diagnosis of COPD/emphysema. *Id*. The administrative law judge discredited Dr. Dahhan's opinion because he did not adequately account for claimant's fixed respiratory impairment and stated, without foundation, that claimant has been treated with bronchodilators, which is inconsistent with the diagnosis of a coal dust-induced pulmonary disease. *Id*. The administrative law judge concluded that, based on his determination that Dr. Simpao's opinion diagnosing legal pneumoconiosis outweighed the contrary opinions of Drs. Dahhan and Jarvis, claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 17-18.

Employer contends that, in finding the existence of legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4), the administrative law judge did not properly weigh the opinions of Drs. Dahhan and Jarvis. We disagree. The administrative law judge acted within his discretion as fact-finder in according little probative weight to Dr. Dahhan's opinion, because he did not explain why the fixed portion of claimant's obstructive impairment was unrelated to coal dust exposure.[5] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); Decision and Order at 16. The administrative law judge also rationally determined that the credibility of Dr. Jarvis's opinion, that claimant "has no appreciable pulmonary disease," was diminished, as Dr. Jarvis did not review the x-rays of record, which were interpreted as showing the presence of emphysema. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22

[5] Because the administrative law judge provided a valid rationale for discrediting Dr. Dahhan's opinion, we decline to address employer's allegation of error regarding the administrative law judge's finding that Dr. Dahhan relied on speculation to state that claimant is being treated with bronchodilators. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order at 17.

BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 17. We affirm, therefore, the administrative law judge's finding that the opinions in which Drs. Dahhan and Jarvis ruled out the presence of legal pneumoconiosis were entitled to little probative weight under 20 C.F.R. §718.202(a)(4).

Regarding Dr. Simpao, we affirm, as unchallenged by employer on appeal, the administrative law judge's finding that Dr. Simpao's diagnosis of legal pneumoconiosis was well-reasoned, well-documented, and consistent with the DOL-endorsed medical view that coal dust exposure can cause obstructive lung disease. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15, 17. In light of our affirmance of the administrative law judge's credibility determinations, we also affirm the administrative law judge's finding that Dr. Simpao opinion outweighed the contrary opinions of Drs. Dahhan and Jarvis, and was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 17-18.

Furthermore, to the extent that employer's allegations of error regarding the administrative law judge's weighing of the medical opinions under 20 C.F.R. §718.202(a)(4), encompass the administrative law judge's weighing of the medical opinions relevant to total disability causation, they are rejected. The administrative law judge rationally determined that Dr. Jarvis's opinion was not probative at 20 C.F.R. §718.204(c), as he did not diagnose a respiratory or pulmonary impairment and, therefore, did not comment as to the cause of claimant's obstructive impairment. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 23; Director's Exhibit 17. The administrative law judge also acted within his discretion in according little probative weight to the opinion of Dr. Dahhan, that claimant's totally disabling impairment is unrelated to coal dust exposure, on the ground that he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *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. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 23; Employer's Exhibit 5. Consequently, we affirm the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge