

BRB No. 09-0249 BLA

P.W. )  
o/b/o F.D.W. (deceased) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
PREMIUM COAL COMPANY ) DATE ISSUED: 09/23/2009  
 )  
Employer-Respondent )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

P.W., Caryville, Tennessee, *pro se*.<sup>1</sup>

Keith R. Mason (Law Offices of Keith R. Mason), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

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<sup>1</sup> Sadie C. Tipton, a benefits counselor with Community Health of East Tennessee, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Tipton is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant<sup>2</sup> appeals, without the assistance of legal counsel, the Decision and Order - Denying Benefits (2006-BLA-5342) of Associate Chief Administrative Law Judge William S. Colwell rendered on a miner's claim filed on June 6, 2003 pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Adjudicating the case pursuant to 20 C.F.R. Part 718, the administrative law judge found that the record supports employer's stipulation to twenty years and eight months of coal mine employment. Addressing the merits of entitlement, the administrative law judge found the x-ray and medical opinion evidence sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and (4) and 718.203(b), but insufficient to establish "legal" pneumoconiosis pursuant to Section 718.202(a)(4).<sup>3</sup> In addition, the administrative law judge found the evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish that the miner's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim.

Claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge, arguing that the administrative law judge erred in excluding from consideration the medical opinion of Dr. Baker on the issue of causation pursuant to Section 718.204(c).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact

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<sup>2</sup> Claimant is the widow of the miner, F.D.W., who died on May 15, 2005. Director's Exhibit 35. Claimant has not filed a survivor's claim, but is pursuing the miner's claim.

<sup>3</sup> A finding of either clinical pneumoconiosis, 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Cornett v. Benham Coal Corp.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). "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).

and conclusions of law are rational, supported by substantial evidence, and in accordance with law.<sup>4</sup> 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 in a miner’s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

After consideration of the administrative law judge’s Decision and Order, the evidence of record and the arguments raised by the Director, we conclude that the administrative law judge’s finding, that the medical opinion evidence is insufficient to establish entitlement to benefits, is correct and contains no error requiring remand or reversal. Specifically, we affirm the administrative law judge’s finding that claimant failed to establish that the miner’s total disability was due to pneumoconiosis pursuant to Section 718.204(c).

In considering the issue of disability causation, the administrative law judge initially restated his finding pursuant to Section 718.204(b) that Drs. Dahhan, Fino and Isber agreed that the miner had a totally disabling respiratory impairment, whereas Dr. Baker diagnosed a mild respiratory impairment but opined that the miner was capable of performing his usual coal mine employment. Decision and Order at 27, 28. Of the physicians who diagnosed total disability, the administrative law judge correctly noted that Dr. Dahhan opined that the miner’s respiratory disability was due entirely to smoking, Dr. Fino opined that the miner’s respiratory impairment was due to chronic obstructive pulmonary disease unrelated to coal dust exposure, and Dr. Isber, the miner’s treating physician, opined that the miner’s respiratory impairment was due to coal workers’ pneumoconiosis. Decision and Order at 28; Claimant’s Exhibit 1; Employer’s Exhibits 1, 2.

Weighing the conflicting evidence, the administrative law judge permissibly assigned less weight to the opinions of Drs. Dahhan and Fino, as to the cause of the miner’s disability, since neither physician was of the opinion that the miner had clinical pneumoconiosis, contrary to the administrative law judge’s finding at Section

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<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner’s coal mining employment was in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 4.

718.202(a)(1) and (4). *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated 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); *see Cornett v. Benham Coal Corp.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); Decision and Order at 28. We also affirm the administrative law judge's decision to accord less weight to Dr. Isber's opinion since the administrative law judge properly found that the opinion was unclear and Dr. Isber did not adequately explain his conclusion that the miner's mild impairment was due to coal workers' pneumoconiosis. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-623, 2-647 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-495, 2-512 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order 29.

With regard to Dr. Baker's opinion, that the miner suffered from a mild pulmonary impairment due to coal dust exposure and cigarette smoking, the administrative law judge accorded his opinion little weight because Dr. Baker did not diagnose total respiratory disability and, therefore, did not discuss total disability causation. Decision and Order at 28 n.12. The Director, in his response to claimant's appeal, contends that the administrative law judge erred in finding that Dr. Baker's determination, that claimant's mild impairment was due to both cigarette smoking and coal dust exposure, is insufficient to establish disability causation pursuant to Section 718.204(c). Specifically, the Director contends that the administrative law judge erred in finding that, because Dr. Baker's opinion was inconsistent with the administrative law judge's finding regarding the extent of the miner's disability, his opinion was not entitled to any weight regarding disability causation. Rather, the Director states that once the administrative law judge found total disability established, if a physician acknowledges at least some degree of respiratory impairment, the physician's conclusion on disability causation may be credible, notwithstanding any error in his opinion regarding the extent of disability, citing *Smith v. Martin County Coal Co.*, 23 BLR 1-69, 1-75 (2004), *aff'd* 233 Fed. Appx. 507 (6th Cir. May 25, 2007). Director's Letter Brief at 2.

There is merit, in part, to the Director's contention that the administrative law judge erred in declining to weigh Dr. Baker's opinion on disability causation pursuant to Section 718.204(c). The Director is correct in arguing that the issue at Section 718.204(c) is not the extent of the miner's disabling respiratory impairment, but rather, the cause of the miner's respiratory disability. 20 C.F.R. §718.204(c); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). Thus, as the Director contends, the administrative law judge erred in rejecting Dr. Baker's opinion on disability causation at Section 718.204(c) on the ground that Dr. Baker failed to diagnose a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). *Smith*, 23 BLR at 1-75; Decision and Order at 28 n.12.

However, based on the facts of this case, this error is harmless and remand of the case to the administrative law judge is not necessary because the administrative law judge also found that Dr. Baker did not sufficiently discuss his opinion on disability causation. Decision and Order at 28 n.12; *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). In order to establish disability causation, claimant must “affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment” and establish that it is more than “merely a speculative cause of his disability.” *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-186 (6th Cir. 1997). In this case, Dr. Baker provided no explanation or medical rationale for his opinion on disability causation; specifically, Dr. Baker did not explain how the underlying documentation supported his conclusion on disability causation. *Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512 *Clark*, 12 BLR at 1-155; Director’s Exhibit 9. Because Dr. Baker’s opinion is lacking in sufficient detail to support a conclusion that the miner’s pneumoconiosis is a contributing cause, in a discernible way, to his total respiratory disability, it is legally insufficient to establish disability causation pursuant to Section 718.204(c). *Smith*, 127 F.3d at 507, 21 BLR at 2-186; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Consequently, the administrative law judge rationally found that there is no credible evidence that the miner’s pneumoconiosis is a substantially contributing cause of his pulmonary impairment.

Since claimant has not established that the miner’s total disability was due to pneumoconiosis, a requisite element of entitlement under Part 718, an award of benefits is precluded. *Hill*, 123 F.3d at 416, 21 BLR at 2-197; *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge