

BRB No. 09-0336 BLA

F.R. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 TALL TIMBER COAL COMPANY )  
 )  
 and )  
 )  
 UNDERWRITERS SAFETY & CLAIMS, ) DATE ISSUED: 09/29/2009  
 INCORPORATED )  
 )  
 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-Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denial of Benefits (04-BLA-5227) of Administrative Law Judge Joseph E. Kane rendered on a claim filed 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). This case involving a subsequent claim filed

on October 24, 2001, is before the Board for the third time. The procedural history of this case, as set forth in the Board's two prior decisions, is incorporated herein by reference. [*F.R.*] v. *Tall Timber Coal Co.*, BRB No. 06-0837 BLA (Aug. 28, 2007); [*F.R.*] v. *Tall Timber Coal Co.*, BRB No. 05-0516 BLA (Feb. 16, 2006)(unpub.). For purposes of this appeal, we note that, in its first decision, the Board affirmed the administrative law judge's determination that the new evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), §725.309(d).<sup>1</sup> [*F.R.*], BRB No. 05-0516 slip op. at 2 n.3. Thus, claimant's subsequent claim is being considered on its merits.

In its second and most recent decision, pursuant to employer's appeal, the Board held that the administrative law judge erred in failing to consider and weigh all of the record evidence when he addressed the merits of entitlement. [*F.R.*], BRB No. 06-0837 slip op. at 6. Thus, the Board vacated the administrative law judge's finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and remanded the case for him to conduct "a complete analysis, including his weighing of the entirety of the evidence on the merits." *Id.* The Board further instructed that if, on remand, the administrative law judge found that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a), he must also reconsider his finding on disability causation pursuant to 20 C.F.R. §718.204(c). *Id.*

On remand, the administrative law judge found that all of the relevant evidence of record established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), but did not establish the existence of legal pneumoconiosis.<sup>2</sup> The

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<sup>1</sup> The Board, however, remanded the case for the administrative law judge to resolve evidentiary issues under 20 C.F.R. §725.414. Further, the Board held that the administrative law judge erred in giving preclusive effect to the finding of pneumoconiosis that was made in claimant's prior denied claim, and instructed the administrative law judge to weigh all of the relevant evidence on that issue and make a finding. [*F.R.*] v. *Tall Timber Coal Co.*, BRB No. 05-0516 BLA (Feb. 16, 2006)(unpub.).

<sup>2</sup> Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

administrative law judge further found that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that all of the evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge found that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to accord preclusive effect to the finding of pneumoconiosis made in claimant's prior denied claim.<sup>3</sup> Claimant argues further that the administrative law judge erred in his analysis of the medical opinion evidence in determining that claimant did not establish the existence of legal pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.<sup>4</sup>

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.<sup>5</sup> 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).

To be entitled 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,

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<sup>3</sup> Our previous holding that the administrative law judge could not give preclusive effect to the finding of pneumoconiosis made in claimant's prior denied claim constitutes the law of the case with regard to this issue, and claimant has not shown a basis for an exception to this doctrine. See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). Therefore, we decline to revisit the issue.

<sup>4</sup> Because no party challenges the administrative law judge's finding of clinical pneumoconiosis arising out of coal mine employment and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), 718.204(b)(2), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>5</sup> The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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*).

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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in finding that the opinions of Drs. Baker, Hussain, and Gaziano did not establish the existence of legal pneumoconiosis.<sup>6</sup> Dr. Baker diagnosed claimant with clinical pneumoconiosis based on an x-ray, and chronic obstructive pulmonary disease, chronic bronchitis, and hypoxemia, all due to “coal dust exposure/? cigarette smoking.” Director’s Exhibit 23 at 32. Dr. Hussain, claimant’s treating physician, diagnosed clinical pneumoconiosis based upon an x-ray, also noting “severe COPD, wheeze[, and] exposure history.” Claimant’s Exhibit 2. Dr. Gaziano diagnosed “coal workers’ pneumoconiosis” based on an x-ray, and stated that the coal workers’ pneumoconiosis caused a moderate impairment.<sup>7</sup> Director’s Exhibit 10 at 190; Claimant’s Exhibit 1.

The administrative law judge found that, although Dr. Baker’s diagnosis of clinical pneumoconiosis was documented and reasoned, his diagnoses of legal pneumoconiosis were not adequately reasoned, because Dr. Baker “failed to provide any reasoning or explanation as to how the evidence supports a finding that these conditions were causally related to coal mine dust exposure.” Decision and Order at 16. Further, the administrative law judge found that Dr. Hussain did not attribute claimant’s COPD to coal mine dust exposure, and thus did not provide a reasoned medical diagnosis of legal pneumoconiosis. The administrative law judge credited Dr. Gaziano’s diagnosis of clinical pneumoconiosis as well-reasoned.<sup>8</sup>

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<sup>6</sup> We reject employer’s assertion that claimant’s argument regarding legal pneumoconiosis is moot because the administrative law judge found that claimant established the existence of clinical pneumoconiosis. Notwithstanding the finding of clinical pneumoconiosis, whether claimant also established legal pneumoconiosis is potentially relevant to whether he can establish that “pneumoconiosis, as defined in §718.201, is a substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment.” 20 C.F.R. §718.204(c)(1); *see* 20 C.F.R. §718.201(a)(2),(b).

<sup>7</sup> Dr. Gaziano also opined that claimant has heart disease, which causes a severe impairment. Director’s Exhibit 10 at 190.

<sup>8</sup> Claimant does not explain the basis for his assertion that the administrative law judge found that Dr. Gaziano diagnosed legal pneumoconiosis, but determined that Dr. Gaziano’s opinion was not well-reasoned. Claimant’s Brief at 17. A review of the administrative law judge’s decision does not reveal such a determination. The administrative law judge did discredit an earlier medical report from Dr. Gaziano, dated

Claimant asserts that the administrative law judge erred because the opinions of Drs. Baker, Hussain, and Gaziano “should have been found to be well reasoned.” Claimant’s Brief at 18. The determination of whether a medical opinion is adequately reasoned is a credibility determination reserved for the administrative law judge. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Further, the Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Therefore, we must reject claimant’s contention.

Claimant further asserts that, even if the opinions of Drs. Baker, Hussain, and Gaziano were poorly reasoned, they “should still have been sufficient . . . to have sustained . . . claimant’s burden” to establish the existence of legal pneumoconiosis, because they were uncontradicted. Claimant’s Brief at 17. Claimant focuses on the administrative law judge’s statement that the opinions of Drs. Dahhan and Rosenberg, submitted by employer, did not address the issue of legal pneumoconiosis. Decision and Order at 16. Assuming, *arguendo*, that the administrative law judge’s statement was accurate,<sup>9</sup> we reject claimant’s assertion. In the case at bar, the administrative law judge exercised his discretion as the trier of fact in determining that the relevant medical opinion evidence was not adequately reasoned to establish the existence of legal pneumoconiosis. See *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-296 (1985), *recon. denied*, 8 BLR 1-5 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Blackledge v. Director, OWCP*, 6 BLR 1-1060 (1984). Therefore, we reject claimant’s assertion and affirm the administrative law judge’s finding that the medical opinion evidence did not establish that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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December 3, 1987, submitted with claimant’s prior claim, in which Dr. Gaziano diagnosed clinical coal workers’ pneumoconiosis based on an x-ray reading. Director’s Exhibit 1 at 128. The administrative law judge discounted Dr. Gaziano’s 1987 diagnosis of clinical pneumoconiosis, because the administrative law judge found that the x-ray evidence at that time was negative for pneumoconiosis. Decision and Order at 15, 16-17.

<sup>9</sup> The record contradicts the administrative law judge’s statement that Drs. Dahhan and Rosenberg did not address legal pneumoconiosis. Dr. Dahhan reported that he found “no evidence of pulmonary impairment . . . caused by, contributed to[,] or aggravated by[,] the inhalation of coal dust . . . .” Director’s Exhibit 17 at 110. Dr. Dahhan concluded that although claimant suffers from multiple cardiac conditions that cause him “significant shortness of breath,” there was no evidence of “cor pulmonale or any . . . condition secondary to the inhalation of coal dust. . . .” *Id.* Dr. Rosenberg opined that claimant has a disabling respiratory impairment that is caused by his cardiac condition, and which “does not relate to underlying CWP,” and “has not been caused or hastened by the past inhalation of coal mine dust. . . .” Employer’s Exhibit 1 at 5.

Claimant contends that the administrative law judge erred in his analysis of the medical opinions when he found that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge applied the proper standard, namely, whether pneumoconiosis is a "substantially contributing cause" of claimant's totally disabling respiratory or pulmonary impairment.<sup>10</sup> 20 C.F.R. §718.204(c)(1); see *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 610-11, 22 BLR 2-288, 2-303 (6th Cir. 2001)(applying 20 C.F.R. §718.204(c)). We therefore reject claimant's contention that the administrative law judge applied the wrong legal standard. Claimant's Brief at 18-19.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered the opinions of Drs. Baker, Hussain, Gaziano, Dahhan, and Rosenberg. Dr. Baker opined that claimant's disabling impairment is due to "coal dust exposure" and "? rheumatoid arthritis." Director's Exhibit 23 at 34. In a questionnaire, Dr. Hussain indicated that claimant has a severe impairment related to pneumoconiosis. Claimant's Exhibit 2. Dr. Gaziano opined that claimant's clinical pneumoconiosis causes a moderate impairment, while his heart disease causes a severe impairment. Director's Exhibit 10 at 190. Subsequently, Dr. Gaziano stated that claimant's disabling impairment is "due at least in part to his coal mine dust exposure." Claimant's Exhibit 1. Drs. Dahhan and Rosenberg concluded that claimant's total disability is the result of his cardiac disease, a condition that is unrelated to coal mine employment. Director's Exhibit 17; Employer's Exhibit 1.

The administrative law judge found that the opinions of Drs. Baker, Hussain, and Gaziano were not adequately reasoned because "none of these physicians offered any explanation as to why they concluded that Claimant's disability is due in part to pneumoconiosis." Decision and Order on Remand at 19. Claimant argues that "the

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<sup>10</sup> As the administrative law judge correctly summarized, a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis:

is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

opinions of Dr[s]. Hussain, Gaziano, and Baker are well supported and well reasoned. Thus, the administrative law judge erred in not so finding.” Claimant’s Brief at 21. As noted, the Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Contrary to claimant’s contention, the administrative law judge acted within his discretion in determining that the opinions of Drs. Baker, Hussain, and Gaziano were unexplained, and were, therefore, inadequately reasoned. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Substantial evidence supports his finding. We therefore reject claimant’s contention.

Claimant asserts that Dr. Hussain’s opinion should have been accorded “significant weight” because he is claimant’s treating physician. Claimant’s Brief at 21. This assertion lacks merit, because, “in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade.” *Eastover Mining Co. v. Williams*, 338 F.3d 501, 512-13, 22 BLR 2-625, 2-647 (6th Cir. 2003). The administrative law judge considered Dr. Hussain’s status as claimant’s treating physician, but permissibly declined to defer to Dr. Hussain’s opinion because he found that it was not adequately reasoned. *See* 20 C.F.R. §718.104(d)(5).

Claimant next asserts that the opinions of Drs. Dahhan and Rosenberg are flawed in various respects, and that the administrative law judge accorded too much weight to their opinions that claimant’s totally disabling respiratory impairment is due to his cardiac disease. Claimant’s Brief at 19-20. Claimant bears the burden to establish that he is totally disabled due to pneumoconiosis, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81, 18 BLR 2A-6-9 (1994), and the administrative law judge found that the medical opinions submitted by claimant were insufficiently reasoned “to establish claimant’s burden of proof on this element of entitlement.”<sup>11</sup> Decision and Order at 19.

Therefore, we affirm the administrative law judge’s finding pursuant to 20 C.F.R. §718.204(c). Because claimant failed to establish that his total disability is due to pneumoconiosis, an essential element of entitlement in a miner’s claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-112.

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<sup>11</sup> Moreover, we note that, contrary to claimant’s argument that the administrative law judge ignored the failure of employer’s physicians to diagnose pneumoconiosis, the administrative law judge accorded less weight to the opinions of Drs. Dahhan and Rosenberg because the doctors did not diagnose pneumoconiosis. Decision and Order at 19. He found, however, that their opinions “retain[ed] some probative value” to the extent that they discussed claimant’s history of heart disease and explained why they concluded that claimant’s respiratory problems are related to heart disease. *Id.*

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge