BRB No. 11-0165 BLA

BOBBY R. BAKER Claimant-Respondent v. APOGEE COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/21/2011 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05074) of Administrative Law Judge Theresa C. Timlin (the administrative law judge) on a living miner's claim filed on November 27, 2007, 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). The administrative law judge accepted "the stipulation of the parties…to eleven years of coal mine employment," Decision and Order at 3 n.3, and found, therefore, that claimant was not entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis.[1] 30 U.S.C. §921(c)(4). Considering entitlement pursuant to

[1] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments,

20 C.F.R. Part 718, however, the administrative law judge awarded benefits thereunder because she found that claimant established pneumoconiosis, that it arose out of coal mine employment, and that it was totally disabling. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c).

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established legal pneumoconiosis pursuant to Section 718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established that claimant's totally disabling respiratory impairment was due to pneumoconiosis at Section 718.204(c).[2] Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has also declined to file a 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 rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 in a miner's claim, a 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. 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*).

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in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner has at least fifteen years of qualifying coal mine employment, and has a totally disabling respiratory impairment, there is a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[2] The administrative law judge's findings that clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) and that total disability was established pursuant to 20 C.F.R. §718.204(b) are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 4, 6.

Legal Pneumoconiosis – 20 C.F.R. §718.202(a)(4)

In finding legal pneumoconiosis[4] established pursuant to Section 718.202(a)(4), the administrative law judge found, on weighing all of the medical opinion evidence, that "[c]laimant's coal dust exposure substantially aggravated his respiratory condition, resulting in legal pneumoconiosis." Decision and Order at 10. Specifically, the administrative law judge found the opinions of Drs. Agarwal and Baker, regarding the cause of claimant's respiratory impairment, to be better reasoned and, therefore, more persuasive than the opinions of Drs. Jarboe and Dahhan. She accorded greater weight to the opinion of Dr. Agarwal because "[h]e did not find that [c]laimant's respiratory disease was necessarily *caused* by coal exposure, . . . nevertheless the coal dust [exposure] would have *aggravated his underlying respiratory condition*." Decision and Order at 9 [emphasis added]. The administrative law judge found that Dr. Agarwal's opinion was in keeping with the definition of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(b). Decision and Order at 9. Additionally, the administrative law judge found Dr. Baker's opinion, that claimant's chronic obstructive pulmonary disease was due to both coal dust exposure and smoking, to be persuasive, as he explained how both causes contributed to claimant's obstructive airways disease. Decision and Order at 7.

On the contrary, the administrative law judge found that Dr. Dahhan's opinion, that claimant's respiratory impairment was not due to his coal mine employment, was not well-reasoned, because Dr. Dahhan "failed to consider that pneumoconiosis is a latent, progressive disease which can manifest after coal dust exposure has ceased." Decision and Order at 10. She also found that Dr. Dahhan's opinion was entitled to less weight because he relied on evidence showing the absence of clinical pneumoconiosis to find that claimant's respiratory impairment did not arise out of coal mine employment.

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[4] Section 718.201(a)(2), (b) provides the following:

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes 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(a)(2), (b).

Decision and Order at 8. Regarding Dr. Jarboe's opinion, the administrative law judge found it less persuasive because Dr. Jarboe did *not* consider whether "[c]laimant's coal mine employment could have *aggravated* [*his*] *underlying respiratory disease*," despite stating that claimant was sensitive to "environmental irritants." Decision and Order at 10 [emphasis added]; Employer's Exhibit 2 at 24.

Contrary to employer's contentions, the administrative law judge properly found the opinions of Drs. Agarwal and Baker, that claimant's respiratory impairment was aggravated by his coal mine employment, better reasoned and, therefore, more persuasive than the opinions of Drs. Jarboe and Dahhan. In reaching this finding, the administrative law judge rationally accorded greater weight to the opinion of Dr. Agarwal because he explained how claimant's respiratory impairment, although mainly due to smoking, was *substantially aggravated* by his coal mine employment. *See* 20 C.F.R. §718.201(b); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, contrary to employer's contention, the administrative law judge properly credited Dr. Agarwal's opinion, even though Dr. Agarwal stated that it was not possible to accurately determine the individual contribution of either smoking or coal dust exposure to claimant's respiratory impairment. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Additionally, contrary to employer's contention, the administrative law judge properly relied on Dr. Baker's opinion, despite the doctor's failure to apportion the cause of the miner's respiratory impairment between smoking and coal dust exposure. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Gross*, 23 BLR at 1-18. Further, she properly credited Dr. Baker's opinion because Dr. Baker explained how coal mine employment "substantially aggravated" claimant's respiratory impairment. *See* 20 C.F.R. §718.202(a)(4); *Clark*, 12 BLR at 1-155.

Turning to the opinions of Drs. Jarboe and Dahhan, contrary to employer's contentions, the administrative law judge properly found these opinions to be less persuasive on the issue of legal pneumoconiosis. Specifically, the administrative law judge properly rejected the opinion of Dr. Dahhan, that claimant's respiratory impairment was not due to coal dust exposure, because it was based on evidence, namely a negative chest x-ray interpretation, showing that claimant did not have clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Further, contrary to employer's contention, the administrative law judge properly rejected the opinion of Dr. Dahhan because the doctor failed to consider that pneumoconiosis is a latent and progressive disease in formulating his opinion. The administrative law judge noted that Dr. Dahhan opined that claimant's positive response to bronchodilator agents reflected that claimant "had not had any exposure to coal dust for over ten years, a duration of absence sufficient to cause cessation of any industrial bronchitis that he might have had." 20 C.F.R. §718.201(c); *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th

Cir. 2005); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); Decision and Order at 9.

Considering Dr. Jarboe's opinion, the administrative law judge found that, while Dr. Jarboe stated that claimant [did] not have legal pneumoconiosis, since [c]laimant's moderate air flow obstruction was caused by cigarette smoking, asthma, and/or obesity. Dr. Jarboe "did not address the question of whether [c]laimant's air flow obstruction was *aggravated*, rather than caused, by coal dust exposure" pursuant to Section 718.201(b). Decision and Order at 8 [emphasis added]. The administrative law judge found this particularly troublesome in light of Dr. Jarboe's deposition testimony, "that [c]laimant was sensitive to environmental irritants." *See Clark*, 12 BLR at 1-155; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 10; Employer's Exhibit 2. The administrative law judge, therefore, properly concluded that, since Dr. Jarboe stated that claimant was sensitive to environmental irritants, his opinion was not reasoned because he did not address whether claimant's *underlying respiratory impairment was aggravated by his coal mine employment, or whether his coal mine employment contributed to the underlying respiratory impairment*, in keeping with the definition of legal pneumoconiosis at Section 718.201(b). *See Clark*, 12 BLR at 1-155.

We conclude, therefore, that the administrative law judge permissibly found, on weighing the medical opinion evidence, that the opinions of Drs. Agarwal and Baker were more reasoned and, therefore, more persuasive on the issue of legal pneumoconiosis, as they addressed and explained how "[c]laimant's coal dust exposure substantially aggravated his respiratory condition." *See* 20 C.F.R. §718.201(b); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 10. We, therefore, affirm the administrative law judge's finding that legal pneumoconiosis was established by the medical opinion evidence at Section 718.202(a)(4). *See* 20 C.F.R. §§718.201(b); 718.202(a)(4).

Disability Causation – 20 C.F.R. §718.204(c)

In finding that disability causation was established at Section 718.204(c), the administrative law judge permissibly found that the opinions of Drs. Agarwal and Baker, who found that claimant's pneumoconiosis was a primary or substantially contributing cause of his disabling pulmonary condition, were more credible than the contrary opinions of Drs. Jarboe and Dahhan. The administrative law judge permissibly found that the disability causation opinions of Drs. Jarboe and Dahhan were less credible because they failed to find the existence of legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge's finding that claimant's total disability was due to pneumoconiosis is, therefore, affirmed.

We, therefore, affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge