

BRB No. 11-0845 BLA

WILLIAM D. PENROD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED: 09/25/2012
)	
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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Elizabeth Ashley Bruce and Ronald K. Bruce, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (07-BLA-5555) of Administrative Law Judge Alice M. Craft rendered on a miner's claim filed on January 24, 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 her initial Decision and Order, the administrative law judge credited claimant with thirty-three years of coal mine employment,² based on the parties' stipulation, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that employer withdrew total disability pursuant to 20 C.F.R. §718.204(b)(2) as a contested issue, at the hearing held on June 18, 2004. Additionally, the administrative law judge determined that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *W.P. [Penrod] v. Peabody Coal Co.*, BRB No. 08-0609 BLA (June 26, 2009)(unpub.). Specifically, the Board held that the administrative law judge did not address a negative x-ray reading and a negative CT scan reading submitted by employer. *Penrod*, slip op. at 4-5. The Board instructed the administrative law judge to determine whether they were admissible and, if so, to reconsider her finding that the existence of clinical pneumoconiosis³ was established pursuant to 20 C.F.R. §718.202(a)(1),(4). *Id.*

Additionally, pursuant to 20 C.F.R. §718.202(a)(4), the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis,⁴ in the form of obstructive lung disease due, in part,

¹ Because this claim was filed before January 1, 2005, a recent amendment to the Black Lung Benefits Act, which became effective on March 23, 2010, does not affect this case. See Pub. L. No. 111-148, §1556(a),(c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

² Claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 17. 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).

³ 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).

⁴ Legal pneumoconiosis is defined as "any chronic lung disease or impairment and

to coal mine dust exposure. *Penrod*, slip op. at 7-8. The Board remanded the case for the administrative law judge to initially address whether Dr. Simpao's opinion, diagnosing obstructive lung disease due to both coal mine dust exposure and smoking, was documented and reasoned. Further, the Board held that the administrative law judge did not adequately support her finding that Dr. Fino's opinion, attributing claimant's obstruction entirely to smoking, was contrary to the principles underlying the regulations. Additionally, the Board held that the administrative law judge effectively shifted the burden of proof to employer when she found that Drs. Fino and Repsher did not rule out coal mine dust exposure as a cause of claimant's respiratory condition. The Board therefore instructed the administrative law judge, on remand, to reconsider the medical opinion evidence on the existence of legal pneumoconiosis. The Board, however, rejected employer's allegation of error at 20 C.F.R. §718.204(b)(2), and affirmed the administrative law judge's determination that employer withdrew its contest of the issue of whether claimant is totally disabled. *Penrod*, slip op. at 9. Finally, because the Board vacated the administrative law judge's finding of the existence of pneumoconiosis, the Board also vacated the finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instructed the administrative law judge to reconsider that issue, if reached, on remand. *Penrod*, slip op. at 10.

On remand, the administrative law judge addressed the admissibility of the evidence, and found that the x-ray evidence under 20 C.F.R. §718.202(a)(1), and the CT scan and medical opinion evidence under 20 C.F.R. §718.202(a)(4), did not establish the existence of clinical pneumoconiosis. The administrative law judge, however, determined that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in her analysis of the medical opinion evidence in finding the existence of legal pneumoconiosis established. Additionally, employer challenges the administrative law judge's previous finding that claimant is totally disabled by a respiratory or pulmonary impairment. Finally, employer contends that the administrative law judge erred in finding that claimant's total disability is due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in referring to the preamble to the amended

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." 20 C.F.R. §718.201(a)(2).

regulations in assessing the credibility of the medical opinions on the issue of legal pneumoconiosis, and to reject employer's contention that total disability remains as a contested issue. In a reply brief, employer reiterates its arguments.

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. 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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

The administrative law judge, on remand, reconsidered the medical opinions of Drs. Simpao, Fino, and Repsher regarding the existence of legal pneumoconiosis. The administrative law judge found Dr. Simpao's opinion, that claimant's coal mine dust exposure contributed to his obstructive pulmonary impairment, to be documented and reasoned. The administrative law judge discounted Dr. Repsher's opinion, that claimant's chronic obstructive pulmonary disease is due solely to smoking, because she found that Dr. Repsher not adequately explain why claimant's thirty-three years of coal mine dust exposure did not contribute to his impairment. Further, the administrative law judge discounted Dr. Fino's opinion, that claimant's impairment is due to smoking, finding that it was based, in part, on reasoning that was inconsistent with the Department of Labor's findings regarding the medical literature concerning coal mine dust exposure and its potential to cause significant obstructive lung disease.⁵ Further, the administrative law judge found that Dr. Fino's statement, that claimant's objective test results were consistent with smoking-related disease, did not adequately address whether coal mine dust exposure also contributed to claimant's obstructive impairment. Therefore, the

⁵ As summarized by the administrative law judge, Dr. Fino stated that coal mine dust causes a "statistical" drop only in miners' FEV1, not a "clinically significant" drop. Director's Exhibit 31-83. Based on that rationale, Dr. Fino opined that "if we gave [claimant] back" the amount of his lost FEV1 capacity that would have been caused by his exposure to coal mine dust, he would be as disabled by obstruction had he never mined coal. *Id.*

administrative law judge found the existence of legal pneumoconiosis established, based on Dr. Simpao's opinion.

Turning to the cause of the miner's total disability, the administrative law judge found that Dr. Simpao's opinion, attributing claimant's disabling impairment, in part, to coal mine dust exposure, established that pneumoconiosis is a substantially contributing cause of claimant's total disability. The administrative law judge discounted Dr. Fino's opinion that claimant's disability is due to smoking, because Dr. Fino did not diagnose claimant with legal pneumoconiosis. Further, the administrative law judge found that Dr. Repsher "did not offer any opinion [on] whether the [c]laimant was disabled." Decision and Order at 17.

Employer argues that Dr. Simpao's opinion that both coal mine dust exposure and smoking caused claimant's lung disease, does not constitute a well-reasoned diagnosis of legal pneumoconiosis. Employer argues further that the administrative law judge erred in her analysis of the opinions of Drs. Fino and Repsher, and that she shifted the burden of proof to employer by requiring Drs. Fino and Repsher to adequately explain why claimant's coal mine employment played no role in his lung disease. Further, employer maintains that the administrative law judge mischaracterized Dr. Fino's opinion, and erred in evaluating the credibility of his opinion in light of the Department of Labor's discussion of the medical literature in the preamble to the amended regulations.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to employer's initial argument, substantial evidence supports the administrative law judge's finding that Dr. Simpao based his opinion on consideration of his clinical findings, the objective evidence, and claimant's history of cigarette smoking and exposure to coal mine dust. Director's Exhibits 10, 31. Therefore, the administrative law judge permissibly found that Dr. Simpao's opinion was documented and reasoned and entitled to probative weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-551 (6th Cir. 2002); *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).

Regarding the medical opinions of Drs. Fino and Repsher, we hold that, contrary to employer's assertion, the administrative law judge reasonably discounted Dr. Repsher's opinion on the existence of legal pneumoconiosis, as he did not explain his opinion that claimant's obstruction is unrelated to his coal mine dust exposure. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Director's Exhibit at 31-116. Further, the administrative law judge accurately characterized Dr. Fino's opinion, and acted within her discretion in finding that Dr. Fino's opinion merited less weight, because it was based

on reasoning inconsistent with the medical science accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. 20 C.F.R. §718.201(a)(2); *see A & E Coal Co. v. Adams*, F.3d , No. 11-3926, 2012 WL 3932113, at *3-4 (6th Cir. Sept. 11, 2012); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313 (4th Cir. 2012). Additionally, the administrative law judge permissibly discounted Dr. Fino's opinion because she found that Dr. Fino did not adequately explain how he determined that claimant's thirty-three years of coal mine dust exposure did not contribute to, or aggravate, his chronic obstructive lung disease. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark*, 12 BLR at 1-155.

Further, we reject employer's contention that the administrative law judge, on remand, shifted the burden of proof to employer to rule out coal mine dust exposure as a cause of claimant's lung disease. The administrative law judge properly required claimant to establish the existence of legal pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515-16, 22 BLR 2-625, 2-651 (6th Cir. 2003); Decision and Order at 8, 13, 14, 16. Because the administrative law judge, on remand, permissibly found that Dr. Simpao's medical opinion constituted a documented and reasoned diagnosis of legal pneumoconiosis, and permissibly discounted the contrary medical opinions of Drs. Fino and Repsher, we affirm the administrative law judge's determination that claimant met his burden to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁶ Decision and Order at 16, 18.

Employer challenges the administrative law judge's finding that claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Previously, we held that substantial evidence supported the administrative law judge's finding that employer withdrew total disability as a contested issue. *Penrod*, slip op. at 9. Our holding constitutes the law of the case with regard to that issue, and employer has not shown a basis for an exception to the doctrine. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Therefore, we decline to revisit our holding.

⁶ In view of our holding that the administrative law judge provided valid reasons for the weight she accorded to the medical opinions of Drs. Simpao, Fino, and Repsher based upon the physicians' reasoning, we need not address employer's additional argument that the administrative law judge erred in determining Dr. Simpao's qualifications. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Pursuant to 20 C.F.R. §718.204(c), employer argues that the administrative law judge erred in her analysis of the medical opinion evidence when she found that claimant is totally disabled due to legal pneumoconiosis. We disagree. Contrary to employer's contention, the administrative law judge permissibly relied on the opinion of Dr. Simpao, that both smoking and coal mine dust exposure contributed to claimant's impairment, as a reasoned opinion that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004). The administrative law judge reasonably discounted Dr. Fino's contrary opinion regarding the cause of claimant's disability, because Dr. Fino did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding. See *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). Employer contends that Dr. Repsher's failure to state whether claimant is totally disabled was not a sufficient reason for the administrative law judge to discount his opinion that smoking is the cause of claimant's impairment. However, the same reason that the administrative law judge gave for discounting Dr. Fino's disability causation opinion applies to Dr. Repsher's opinion, as Dr. Repsher did not diagnose claimant with legal pneumoconiosis. See *Skukan*, 993 F.2d at 1233, 17 BLR at 2-104. Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge