U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0260 BLA

RUTH A. EDMONSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACK BEAUTY COAL COMPANY	)	
	)	DATE ISSUED: 01/30/2015
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5017) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on October 5, 2009. Director's Exhibit 2.

In her Decision and Order, the administrative law judge credited claimant with 14.12 years of coal mine employment[1] and adjudicated the claim pursuant to the

[1] The record reflects that claimant's coal mine employment was in Indiana. Director's Exhibits 3, 5; Hearing Transcript at 16, 23. Accordingly, this case arises

regulations in 20 C.F.R. Part 718.[2] The administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[3] and that claimant was totally disabled 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 finding 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 was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer also contends that the administrative law judge's preconceived views of the evidence deprived it of a fair hearing. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer filed a reply brief, restating its position. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[4]

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

---

within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the Act) with respect to the entitlement criteria for claims, such as this one, which were filed after January 1, 2005, and were pending on or after March 23, 2010. Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). Because claimant was credited with less than fifteen years of qualifying coal mine employment, claimant is not entitled to the presumption at Section 411(c)(4) of the Act. Therefore, the administrative law judge addressed whether claimant satisfied her burden to establish all the elements of entitlement under 20 C.F.R. Part 718.

[3] "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).

[4] The administrative law judge's finding of 14.12 years of coal mine employment, and her finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) are not challenged on appeal. Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 pursuant to 20 C.F.R. Part 718, claimant must establish that she suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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).

Legal Pneumoconiosis

In addressing whether claimant established the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Rasmussen, Houser, Repsher and Renn. Drs. Rasmussen and Houser diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 10; Claimant's Exhibits 4, 5, 9. In contrast, Drs. Repsher and Renn opined that claimant does not have legal pneumoconiosis, but suffers from COPD due entirely to cigarette smoking. Director's Exhibit 20; Employer's Exhibits 2, 5, 6, 9.

The administrative law judge discredited the opinions of Drs. Repsher and Renn because she found that each was inadequately explained and inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 24-26. Conversely, the administrative law judge found that Dr. Rasmussen's diagnosis of legal pneumoconiosis was well-reasoned and well-documented, and consistent with the regulations. Decision and Order at 24, 26. Although the administrative law judge found that Dr. Houser's opinion supported Dr. Rasmussen's diagnosis of legal pneumoconiosis, she found that Dr. Houser's opinion was inadequately documented and entitled to little weight.[5] The administrative law judge, therefore, accorded the greatest probative weight to Dr. Rasmussen's opinion, as supported by that of Dr. Houser, and held that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer initially challenges the administrative law judge's reliance on the preamble as the basis for evaluating the medical opinions. Employer contends that the administrative law judge's "mechanical reliance on the preamble . . . exceeds any judicial

[5] The administrative law judge noted that it was unclear what length of coal mine employment Dr. Houser considered in formulating his opinion. Decision and Order at 26.

authorization for consulting the preamble." Employer's Brief at 17. Further, employer maintains that the "[Administrative Procedure Act] and case law prohibit such practice where, as here, a preamble was not published for notice and comment . . . ." and that it has thus been denied a fair hearing. *Id.*

Employer's allegations of error are without merit. The preamble to the amended regulations sets forth how the DOL has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Multiple circuit courts, and the Board, have held that an administrative law judge, as part of the deliberative process, may rely on the preamble as a guide in assessing the credibility of the medical evidence. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Further, contrary to employer's contention, the administrative law judge did not utilize the preamble as a legal rule, or as a presumption that all obstructive lung disease is pneumoconiosis, but merely consulted it as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Looney*, 678 F.3d at 314-15, 25 BLR at 2-129-32. Accordingly, we reject employer's argument that the administrative law judge erred in utilizing the preamble in her evaluation of the medical opinion evidence.

Employer also contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion to support a finding of legal pneumoconiosis. Employer asserts that Dr. Rasmussen's opinion is based on an inflated work history, and a deflated smoking history, and is not sufficiently reasoned to satisfy claimant's burden of proof. Employer's Brief at 18-25. These arguments are without merit.

The administrative law judge noted that Dr. Rasmussen relied on a 16 year history of coal mine employment,[6] while the administrative law judge found 14.12 years of coal

[6] The administrative law judge correctly noted that Dr. Rasmussen initially considered an employment history of 33-34 years. Decision and Order at 24; Claimant's Exhibit 4. However, when Dr. Rasmussen was asked whether his opinion would change if claimant had only sixteen years of coal mine employment, as initially determined by the Department of Labor, Dr. Rasmussen stated that he "continue[d] to believe" that claimant's disabling chronic lung disease was "due to both her cigarette smoking and to

mine employment established, and relied upon a smoking history of "over 50 years," which the administrative law judge found to be similar to her own finding of 52.5 pack years. Decision and Order at 24. Dr. Rasmussen diagnosed severe COPD with chronic bronchitis and emphysema, and explained that both coal mine dust and cigarette smoking cause COPD, and that their effects are "indistinguishable" and "independent, but additive." Claimant's Exhibits 4, 9. Thus, Dr. Rasmussen further explained, it is impossible to separate the effects of smoking and coal mine dust exposure in the development of COPD and emphysema. Claimant's Exhibits 4, 9. The administrative law judge noted that, based on claimant's exposure histories, Dr. Rasmussen concluded that while cigarette smoking was a "major contributor" to claimant's impairment, coal mine dust exposure was also a "significant" and "material" contributing cause of claimant's disabling lung disease. Decision and Order at 24; Claimant's Exhibit 4. Because the administrative law judge specifically found that Dr. Rasmussen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's disabling COPD was due to both smoking and coal dust exposure, we affirm the administrative law judge's permissible finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis is "well-reasoned and documented."[7] *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37 (7th Cir. 2007); *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 24, 26. The administrative law judge also permissibly accorded greater weight to Dr. Rasmussen's opinion because it is consistent with the premises underlying the regulations, that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and that the effects of cigarette smoking and coal mine dust exposure are additive. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 650 F.3d at 257, 24 BLR at 2-383; Decision and Order at 22, 24, 26, *citing* 65 Fed. Reg. 79,920, 79,940, 79,943 (Dec. 20, 2000).

Contrary to employer's contention, it was within the administrative law judge's discretion to credit Dr. Rasmussen's opinion despite its reliance on a longer coal mine

---

her coal mine dust exposure" and that coal mine dust exposure was "a significant co-contributor." Claimant's Exhibit 5.

[7] We reject employer's contention that the administrative law judge erred in not considering Dr. Rasmussen's 2007 medical report in light of the doctor's previous January 29, 2002 deposition testimony. The opinions set forth in Dr. Rasmussen's August 27, 2007 report are based upon the doctor's review of reports and studies that were generated subsequent to the date of his 2002 deposition. Claimant's Exhibit 1.

employment history than that found established by the administrative law judge. *See Clark*, 12 BLR at 1-155; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *Lucostic*, 8 BLR at 1-47; *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); *see also Looney*, 678 F.3d at 311 n.2, 25 BLR at 2-124 n.2. Moreover, because Dr. Rasmussen specifically opined that claimant's coal mine dust exposure contributed to her COPD with chronic bronchitis and emphysema, we affirm the administrative law judge's conclusion that Dr. Rasmussen's opinion is sufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b).

Employer further asserts that the administrative law judge provided invalid reasons for discounting the opinions of Drs. Repsher and Renn on the issue of legal pneumoconiosis. We disagree. In evaluating the medical opinions, the administrative law judge initially found, as was within her discretion, that unexplained inconsistencies between Dr. Repsher's written report, diagnosing a moderate restrictive impairment and no obstruction, and his subsequent deposition testimony, that claimant suffers from a severe, disabling obstructive impairment, called into question the reliability of his opinion.[8] *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988) (administrative law judge properly discredited physician's opinion as unreasoned as doctor failed to explain changes in his conclusions contained in his initial report and those revealed during subsequent deposition); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984); Decision and Order at 24-25. The administrative law judge further found that, in testifying that claimant's severe obstruction was not due to coal mine dust exposure, Dr. Repsher relied, in part, on his view that coal mine dust exposure rarely causes a degree of COPD that is clinically significant.[9] Decision and Order at 25. In promulgating the revised definition

[8] The administrative law judge correctly noted that, in his written report Dr. Repsher opined that while the pulmonary function studies he performed were invalid due to poor effort and cooperation, Dr. Houser's pulmonary function study results, which Dr. Repsher reviewed, "ruled out any clinically significant obstructive lung disease." Decision and Order at 24-25; Director's Exhibit 20 at 3. In his report, Dr. Repsher further opined that claimant's hypoxemia, reflected on her blood gas studies, was consistent with her obesity. Director's Exhibit 20 at 3. During his deposition, however, Dr. Repsher testified that claimant suffered from a severe obstructive impairment, and that her hypoxemia was attributable to her obstructive disease. Decision and Order at 24-25; Employer's Exhibit 9 at 5, 6. The record does not reflect that Dr. Repsher performed or reviewed any additional studies between the time he wrote his report and the time he testified at deposition.

[9] Based upon his review of the medical literature, Dr. Repsher indicated during his deposition that coal mine dust can result in "[v]ery, very mild COPD." Employer's Exhibit 9 at 21. Therefore, Dr. Repsher opined that claimant's coal mine dust exposure was not a significant contributing factor to her disabling obstructive impairment.

of pneumoconiosis set forth in 20 C.F.R. §718.201(a), the DOL reviewed the medical literature on that issue and found that there was a consensus among medical experts that coal mine dust-induced COPD is clinically significant and is not rare. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; 65 Fed. Reg. 79,939-45 (Dec. 20, 2000). Accordingly, the administrative law judge acted within her discretion as fact-finder in determining that the opinion of Dr. Repsher was entitled to diminished weight. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Shores*, 358 F.3d at 486, 23 BLR at 2-18.

Additionally, noting that the preamble to the revised regulations acknowledges the prevailing view of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited the opinions of both Dr. Repsher and Dr. Renn, in part, because they did not adequately explain why claimant's 14.12 years of coal mine dust exposure was not a contributing or aggravating factor, along with her cigarette smoking, to her obstructive pulmonary impairment. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Obush*, 650 F.3d at 257, 24 BLR at 2-383; 65 Fed. Reg. 79,940 (Dec. 20, 2000); Decision and Order at 25-26. Further, the administrative law judge reasonably accorded less weight to Dr. Renn's opinion, that claimant's bullous emphysema is unrelated to coal mine dust inhalation, because it is contrary to the scientific premise underlying the regulations, as set forth in the preamble, that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See* 65 Fed. Reg. 79,939-43 (Dec. 20, 2000); *Obush*, 24 BLR at 1-125-26; *see also Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7; Decision and Order at 26; Employer's Exhibit 5 at 55-56, 63-63, 66. Additionally, contrary to employer's assertion, the administrative law judge permissibly found that Dr. Renn's opinion, that claimant's reduced FEV1/FVC ratio indicated that claimant's disease was due to cigarette smoking, rather than coal mine employment, conflicts with the scientific premise set forth in the preamble that "coal miners have an increased risk of developing COPD. . . . [that] may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC." 65 Fed. Reg. 79,943 (Dec. 20, 2000)(internal citations omitted); *see Sterling*, 762 F.3d at 491-92, 25 BLR 2-645; Decision and Order at 26.

Employer's Exhibit 9 at 19.

Thus, the administrative law judge provided valid reasons for discrediting the opinions of Drs. Repsher and Renn, attributing claimant's disabling obstructive impairment solely to smoking.[10]

Employer also asserts that the administrative law judge selectively analyzed the evidence by accepting, at face value, Dr. Rasmussen's opinion, submitted by claimant, while applying greater scrutiny to its experts' opinions. Employer's Brief at 25. We disagree. Review of the administrative law judge's decision reflects that she considered each physician's qualifications and assessed the documentation and reasoning of each medical opinion, and permissibly accorded the greatest weight to Dr. Rasmussen's opinion, as well-reasoned, well-documented, and in better accord with the premises underlying the regulations, as set forth in the preamble. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Stalcup*, 477 F.3d at 484, 22 BLR at 2-37; Decision and Order at 23-26. Therefore, we reject employer's argument that the administrative law judge selectively analyzed the evidence, and we affirm her finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also found that all of the evidence of record, when weighed together, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 26. Because it is supported by substantial evidence, this finding is affirmed.[11]

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis. We disagree. The administrative law judge rationally discounted the opinions of Drs. Repsher and Renn, that claimant's disabling respiratory impairment was caused entirely by her cigarette smoking, because

[10] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Repsher and Renn, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[11] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found that she was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as her finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 24.

they did not diagnose pneumoconiosis, contrary to the administrative law judge's finding. *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 890, 22 BLR 2-514, 2-528 (7th Cir. 2002); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 28-29. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Rasmussen to find that claimant established the existence of legal pneumoconiosis, she permissibly found that Dr. Rasmussen's opinion supported a finding that claimant is totally disabled due to legal pneumoconiosis, and is sufficient to satisfy claimant's burden of proof.[12] Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's award of benefits.[13]

[12] The regulation at 20 C.F.R. §718.204(c) states that a miner shall be considered totally disabled due to pneumoconiosis, if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. In order to establish that pneumoconiosis is a substantially contributing cause, claimant must establish that her pneumoconiosis is a contributing cause of her total disability, such that mining must be a necessary, but need not be a sufficient, condition of disability. 20 C.F.R. §718.204(c)(1)(i), (ii); *see Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991); *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990).

[13] Employer argues that the "[administrative law judge's] decision and scores of others raise questions as to her impartiality or ability to provide 'just' proceedings." Employer's Brief at 15. The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence, which is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). In the instant case, employer has not met that burden. Employer merely asserts that, in 107 decisions issued by the administrative law judge since 2006, she has declared that "[m]edical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant, . . . are . . . contrary to the premises underlying the regulations." Employer's Brief at 16. Even if employer's characterization of the administrative law judge's decisions is accurate, employer has failed to demonstrate how this reflects bias on the part of the administrative law judge. Moreover, employer has not provided any concrete evidence to support its allegations that the administrative law judge held a preconceived view of the evidence, or that she applied a "formula" that finds employers "strictly liable in any case where a former miner and cigarette smoker is totally disabled by obstructive lung disease." *Id.*

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

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge