

BRB No. 14-0035 BLA

STEVEN MULLINS)
)
 Claimant-Respondent)
)
 v.)
)
 PEN COAL CORPORATION)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 07/28/2014
 PNEUMOCONIOSIS FUND)
)
 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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

William S. Mattingly, Tiffany B. Davis, and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia and Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (06-BLA-6184) of Administrative Law Judge Joseph E. Kane awarding benefits 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 claim filed on March 18, 2005, and is before the Board for the second time.

In his initial decision, the administrative law judge credited claimant with eleven years of coal mine employment,¹ and found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Mullins v. Pen Coal Corp.*, BRB No. 10-0214 BLA (Jan. 20, 2011) (unpub.). However, the Board vacated the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Board also vacated the administrative law judge's finding that the CT scan evidence did not establish the existence of clinical pneumoconiosis. The Board instructed the administrative law judge, on remand, to consider whether claimant could establish the requisite fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption.² 30 U.S.C. §921(c)(4).

On remand, claimant conceded that he was unable to establish the requisite fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. However, the administrative law judge found that the evidence established the existence of both clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R.

¹ The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, 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). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

§718.202(a).³ The administrative law judge further found that the evidence established 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 challenges the administrative law judge's findings that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

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'Keefe 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).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to C.F.R. §718.202(a)(4). In this case, the administrative law judge considered the medical opinions of Drs. Gaziano, Repsher, and Dahhan. Drs. Gaziano diagnosed legal pneumoconiosis, opining that claimant suffered from chronic obstructive pulmonary

³ "Clinical pneumoconiosis" consists of "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 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).

disease (COPD) due to both cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibit 12; Employer's Exhibit 6. Dr. Repsher also diagnosed COPD, but attributed the disease to cigarette smoking and asthma. Director's Exhibit 29; Employer's Exhibit 2. Dr. Dahhan diagnosed a moderate obstructive pulmonary impairment due to cigarette smoking. Employer's Exhibits 1, 4. Drs. Repsher and Dahhan opined that claimant's coal mine dust exposure did not contribute to his obstructive lung disease. Director's Exhibit 29; Employer's Exhibit 1.

The administrative law judge accorded less weight to Dr. Repsher's opinion because he found that it was based on generalities, rather than on the miner's specific condition.⁴ Decision and Order on Remand at 11. The administrative law judge also discredited Dr. Repsher's opinion because he found that it was based on an inaccurate smoking history. *Id.* The administrative law judge accorded less weight to Dr. Dahhan's opinion because he found that the doctor failed to adequately explain how he eliminated claimant's eleven years of coal mine employment as a contributor to his obstructive lung disease. *Id.* The administrative law judge further found that the doctor's reasoning was at odds with the recognition that pneumoconiosis is a latent and progressive disease. *Id.* Conversely, the administrative law judge found that Dr. Gaziano's diagnosis of legal pneumoconiosis was reasoned and documented. *Id.* at 10. Therefore, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in relying on Dr. Gaziano's opinion to support a finding of legal pneumoconiosis. Employer specifically argues that the administrative law judge erred in finding that Dr. Gaziano's diagnosis of legal pneumoconiosis was sufficiently reasoned. Employer's Brief at 11-18. We disagree. Dr. Gaziano based his diagnosis of legal pneumoconiosis on claimant's coal mine employment and smoking histories, a medical history, a physical examination, and the results of a pulmonary function study. Director's Exhibit 12. The administrative law judge found that Gaziano's opinion, that claimant's COPD was due in part to his coal mine dust exposure, was well-reasoned, noting that it was "supported by the results of his own objective testing, and accounts for [c]laimant's coal dust exposure, without ignoring his significant smoking history." Decision and Order on Remand at 10. We conclude that substantial evidence in the record supports the administrative law judge's

⁴ The administrative law judge also accorded less weight to Dr. Repsher's opinion because he found that the doctor "failed to explain [a] change in his position regarding whether the [pulmonary function test] of March 29, 2006 was a reliable indicator or whether [c]laimant suffers from an obstructive impairment." Decision and Order on Remand at 11.

determination that Dr. Gaziano's diagnosis of legal pneumoconiosis was reasoned.⁵ *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000).

We reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Dahhan. The administrative law judge acted within his discretion as the fact-finder when he accorded less weight to Dr. Repsher's opinion because he found that it was "based on generalities and statistical probabilities."⁶ Decision and Order on Remand at 11; *see Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103-4 (7th Cir. 2008); *Knizer v. Bethlehem Mining Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge permissibly questioned Dr. Dahhan's opinion, that claimant's obstructive pulmonary impairment was due solely to smoking, because the physician failed to adequately

⁵ We reject employer's contention that the administrative law judge erred in not explaining why Dr. Gaziano's five-year overestimation of claimant's coal mine employment did not undermine the credibility of his opinion. On remand, the administrative law judge followed the Board's directive to address whether Dr. Gaziano's reliance upon an overestimation of the length of claimant's coal mine employment undermined the credibility of his diagnosis of legal pneumoconiosis. The administrative law judge stated:

Dr. Gaziano relied upon his understanding that [c]laimant worked in coal mine employment for sixteen years. I have again found that [c]laimant worked in coal mine employment for eleven years. Upon further reflection of the record before me, I now find that the difference between sixteen and eleven years is insufficient to undermine the credibility of Dr. Gaziano's opinion that [c]laimant suffers from legal pneumoconiosis.

Decision and Order on Remand at 10. On the facts of this case, we hold that the administrative law judge permissibly determined that the five year difference was not so significant that it undermined the credibility of Dr. Gaziano's opinion. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 311 n.2, 25 BLR 2-115, 2-124 n.2 (4th Cir. 2012).

⁶ Dr. Repsher noted that, "on the average, non-smoking and non-asthmatic coal miners with 0/0 through 3/3 simple [coal workers' pneumoconiosis] will have normal pulmonary function," with the average loss of FEV1 being "so small that it is not detectable in an individual miner." Director's Exhibit 29. Dr. Repsher, therefore, stated that, in claimant's case, "to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma, but not the result of the inhalation of coal mine dust." *Id.*

explain how he eliminated claimant's coal dust exposure as a source of claimant's obstructive impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order on Remand at 12. Therefore, the administrative law judge properly accorded less weight to the opinions of Drs. Repsher and Dahhan.⁷

Because it is supported by substantial evidence, the administrative law judge's finding, that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), is affirmed. 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). *Compton*, 211 F.3d at 208-09, 22 BLR at 2-170; Decision and Order on Remand at 14. Because it is supported by substantial evidence, this finding is also affirmed.⁸

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted the disability causation opinions of Drs. Repsher and Dahhan because the physicians did not diagnose legal pneumoconiosis. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 16. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Gaziano to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Gaziano's opinion supported a finding that claimant is totally disabled due to legal pneumoconiosis. *See Compton*, 211 F.3d at 212, 22 BLR at 2-176. Consequently, we affirm the administrative law judge's finding that the evidence established that claimant's

⁷ Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Repsher and Dahhan, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Repsher and Dahhan.

⁸ In light of our affirmance of the administrative law judge's finding that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we need not address employer's contentions of error regarding the administrative law judge's finding that the evidence established the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge