

BRB No. 12-0253 BLA

SHARON WILLIAMS)
(on behalf of RANDAL WILLIAMS,)
Deceased Miner))
)
Claimant-Respondent)
)
v.) DATE ISSUED: 02/27/2013
)
WILLIAMS BROTHERS COAL)
COMPANY)
)
and)
)
KENTUCKY COAL PRODUCERS)
SELF-INSURANCE 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 Granting Benefits on Remand of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits on Remand (2005-BLA-05239) of Administrative Law Judge Theresa C. Timlin with respect to a subsequent claim filed on January 14, 2004, pursuant to the provisions of the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ This case is before the Board for a third time.² In its most recent decision, the Board affirmed, as unchallenged on appeal, Administrative Law Judge Janice K. Bullard's findings that the claim was timely filed pursuant to 20 C.F.R. §725.308, and that the miner established the existence of clinical pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.202(a)(1). However, the Board vacated Judge Bullard's finding that the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), that employer did not rebut the presumption at 20 C.F.R. §718.203(b), and that the evidence established that the miner's disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Consequently, the Board vacated the award of benefits and remanded the case for reconsideration of the evidence relevant to the existence of legal pneumoconiosis, specifically the opinions of Drs. Fino and Forehand, and disability causation. *Williams v. Williams Brothers Coal Co.*, BRB No. 09-0471 BLA (Apr. 22, 2010)(unpub.).

On remand, the case was reassigned to Judge Timlin (the administrative law judge), who determined that the miner had at least sixteen and a half years of coal mine employment, that the miner established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b), and that his disabling respiratory impairment was due, in part, to clinical pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

¹ Randal Williams, the miner, filed an initial claim for benefits on June 22, 1989, which was denied by the district director on April 25, 1990, because he did not establish any element of entitlement. Director's Exhibit 1. No action was taken by the miner until he filed the current claim. Director's Exhibit 3. The miner died on April 9, 2009, and on April 13, 2011, while the claim was pending before Administrative Law Judge Theresa C. Timlin, the miner's widow, Sharon Williams, filed a motion to substitute herself as the claimant, which the administrative law judge granted.

² In the Board's initial decision, it affirmed, as unchallenged on appeal, Administrative Law Judge Janice K. Bullard's determination that the miner established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *R.W. [Williams] v. Williams Brothers Coal Co.*, BRB No. 07-0562 BLA, slip op. at 2-3 n.1 (Apr. 29, 2008)(unpub.). The Board remanded the case for Judge Bullard to consider whether the claim was timely filed at 20 C.F.R. §725.308(a). *Id.* at 4. In addition, the Board vacated Judge Bullard's findings under 20 C.F.R. §§718.202(a)(1), (4); 718.203(b); 718.204(c), and the award of benefits, and remanded the case to Judge Bullard for reconsideration of these issues.

On appeal, employer argues that the administrative law judge erred in weighing the opinions of Drs. Fino and Forehand on the issue of disability causation at 20 C.F.R. §718.204(c). Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.³

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, rational, and in accordance with applicable law.⁴ 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 in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner had 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

On remand, the administrative law judge indicated that she agreed with Judge Bullard's previous determination that the opinions of Drs. Hussain and Broudy on the issue of disability causation at 20 C.F.R. §718.204(c) were entitled to little weight. 2012 Decision and Order at 11. As employer does not challenge this determination on appeal, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In addition, the administrative law judge concluded that Dr. Fino's opinion was entitled to little weight at 20 C.F.R. §718.204(c), as he found that the miner did not have clinical pneumoconiosis. 2012 Decision and Order at 11. Further, the administrative law judge determined that Dr. Fino's opinion was not well-reasoned on the issue of disability causation, as he did not explain why "variable hypoxemia with exercise" weighed against a contribution from coal dust exposure to the miner's respiratory disability, or explain

³ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established that the miner suffered from clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 1. 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).

why coal dust exposure could not have contributed to the bullous emphysema observed on x-ray. Employer's Exhibit 3; *see* 2012 Decision and Order at 12. In contrast, the administrative law judge determined that Dr. Forehand's opinion, that the miner's disabling respiratory impairment was due to pneumoconiosis and cigarette smoking, was the most reasoned, as it was based on the x-ray evidence establishing clinical pneumoconiosis and was also supported by medical literature cited by Dr. Forehand. 2012 Decision and Order at 11.

Employer contends that the administrative law judge committed reversible error in weighing both of these medical opinions. Regarding Dr. Fino's opinion, employer argues that the administrative law judge substituted her own expertise for that of the doctor in evaluating the significance of the variability in the miner's test results. Employer states that, unlike Dr. Forehand, Dr. Fino provided a reasoned explanation for the variable blood gas study results. In addition, employer asserts that the administrative law judge erred in discrediting Dr. Fino's opinion, based on his x-ray reading, as inconsistent with the administrative law judge's finding that the x-ray evidence was positive for clinical pneumoconiosis. Employer argues that because Dr. Fino classified the x-ray as "2/1 which falls within the classification for 'clinical' pneumoconiosis under 20 C.F.R. §718.102(b)," Dr. Fino's reading cannot be deemed inconsistent with the administrative law judge's finding. Employer's Brief at 17.

We reject employer's arguments concerning the administrative law judge's weighing of Dr. Fino's opinion. Although employer argues that Dr. Fino's interpretation of the March 26, 2004 x-ray is not inconsistent with the administrative law judge's finding of clinical pneumoconiosis, Dr. Fino made it clear that his interpretation "is not a reading consistent with simple coal workers' pneumoconiosis," as "[t]here are no rounded opacities and the upper and middle lung zones are free of any opacities." Employer's Exhibit 2. Therefore, the administrative law judge rationally gave less weight to Dr. Fino's opinion because it conflicted with her finding that the evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a). *See Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Further, the administrative law judge did not, contrary to employer's contention, substitute her own opinion for that of the physician's in evaluating the miner's test results. Rather, the administrative law judge acted within her discretion in finding that Dr. Fino did not adequately explain why the variability in the miner's blood gas study results and the presence of bullous emphysema on x-ray necessarily excluded any contribution by coal dust to the miner's respiratory impairment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Regarding Dr. Forehand's opinion, employer contends that the administrative law judge erred in giving it more weight. Employer asserts that the doctor "relied on a

grossly inaccurate coal mine and smoking histories and did not articulate any valid scientific basis for his conclusory causation opinion.” Employer’s Brief at 8. Employer also argues that the administrative law judge did not properly apply the causation standard because establishing the existence of clinical pneumoconiosis by x-ray is not equivalent to establishing disability causation. Employer states that “[a] reasonable mind could not discount Dr. Forehand’s opinion regarding the cause of [the miner’s] impairment in addressing the legal pneumoconiosis issue under Section 718.202(a)(4) and then credit his opinion on the cause of [the miner’s] impairment on the causation issue under Section 718.204(c).” *Id.* at 11. Employer further asserts that Dr. Forehand did not provide a valid reason for excluding cigarette smoking as having a serious effect on the miner’s lungs. Employer contends that Dr. Forehand’s citation of a study finding that “[twenty percent] of coal miners with coal workers’ pneumoconiosis have irregular opacities in their chest x-rays,” does not establish that this miner was one of those exceptional miners or that the opacities established that pneumoconiosis was a substantial cause of his disabling respiratory impairment. *Id.*, quoting 2009 Decision and Order on Remand at 19. In addition, employer states that the administrative law judge did not address Dr. Forehand’s failure to diagnose emphysema, which should have adversely affected the credibility of his opinion concerning causation. Further, employer argues that the administrative law judge did not properly take into account the credentials of Drs. Forehand and Fino in weighing their opinions.

We reject employer’s assertions concerning the administrative law judge’s consideration of Dr. Forehand’s opinion. Contrary to employer’s contention, the administrative law judge gave less weight to Dr. Forehand’s opinion concerning legal pneumoconiosis on the basis that he relied on inaccurate coal mine employment and smoking histories. *See* 2012 Decision and Order at 9. In addition, the administrative law judge did not rely on Dr. Forehand’s diagnosis of legal pneumoconiosis at 20 C.F.R. §718.204(c), but rather relied on his diagnosis of clinical pneumoconiosis, which the administrative law judge rationally found was supported by the x-ray evidence and medical literature cited by Dr. Forehand.⁵ *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-

⁵ The regulations at 20 C.F.R. §718.201(a)(1) state that:

“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).

553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; 2012 Decision and Order at 11-12. Therefore, the administrative law judge was not required to find that Dr. Forehand's failure to diagnose emphysema affected his opinion that the miner's disabling respiratory impairment was due to clinical pneumoconiosis.

It is true, as employer contends, that Dr. Forehand cited a study indicating that "[t]wenty [percent] of disabled coal miners with coal workers' pneumoconiosis have linear opacities on chest x-ray." Claimant's Exhibit 6. However, as the administrative law judge noted, Dr. Forehand cited this study to support his finding that the miner's linear opacities did not rule out a diagnosis of coal workers' pneumoconiosis, not to establish disability causation.⁶ See 2012 Decision and Order at 11; Claimant's Exhibit 6. The administrative law judge acted within her discretion in giving more weight to Dr. Forehand's opinion on the issue of disability causation than to Dr. Fino's opinion, because Dr. Forehand had diagnosed the miner with pneumoconiosis. See *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Adams*, 886 F.2d at 826, 13 BLR at 2-63-64. Furthermore, as noted by the administrative law judge, Dr. Forehand reasonably explained that the scarring evident on the miner's x-ray, which appears in the form of rounded and linear opacities, interfered with the normal oxygenation of his body and prevented the miner from performing his previous coal mine employment. See *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; 2012 Decision and Order at 11-12; Director's Exhibit 12; Claimant's Exhibit 6. Finally, we reject employer's argument that the administrative law judge did not adequately consider the qualifications of Drs. Fino and Forehand in weighing their opinions. Although an administrative law judge may defer to physicians with superior qualifications, she is not required to do so. See *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's determination that claimant established disability causation at 20 C.F.R. §718.204(c), and further affirm the award of benefits.

⁶ Dr. Fino had cited the irregular opacities as inconsistent with simple pneumoconiosis. Employer's Exhibit 3 at 1; see 2008 Decision and Order at 18.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge