

BRB No. 14-0074 BLA

HAROLD CALLOWAY)
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 Claimant-Respondent)
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 v.)
)
 ISLAND CREEK COAL COMPANY) DATE ISSUED: 07/29/2014
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 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 on Remand Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2003-BLA-6695) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on December 17, 2001, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act).¹ This case is before the Board

¹ On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Based on the filing date of this claim, the amendments are not applicable.

for the second time.² In a Decision and Order dated January 29, 2009, Administrative Law Judge Thomas F. Phalen, Jr. credited claimant with nineteen years of coal mine employment, and found that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, Judge Phalen found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b), (c), and awarded benefits accordingly. Upon review of employer's appeal, the Board affirmed the award of benefits. *Calloway v. Island Creek Coal Co.*, BRB No. 09-0361 BLA (Nov. 27, 2009) (unpub.).

Employer subsequently filed an appeal with the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises.³ The court rejected employer's argument that Judge Phalen erred in crediting the opinions of Drs. Majmudar and Baker, that claimant suffers from legal pneumoconiosis, over the contrary opinions of Drs. Repsher and Selby. *See Island Creek Coal Co. v. Calloway*, 460 F. App'x 504, 510-11 (2012) (unpub.). Thus, the court affirmed Judge Phalen's findings at 20 C.F.R. §718.202(a)(4). *Id.* The court held, however, that Judge Phalen erred in his analysis of whether claimant satisfied his burden to establish disability causation under 20 C.F.R. §718.204(c), because he "applied a less rigorous standard," by requiring claimant to establish only that his disability be due, in part, to coal dust exposure. *Id.* at 512-13. The court observed that under the 2001 revised regulations, claimant was required to establish that pneumoconiosis was a substantial contributing factor in his respiratory disability. *Id.* at 513. Consequently, the court vacated the award of benefits and remanded the case for the administrative law judge to determine whether claimant proved total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

On remand, due to Judge Phalen's retirement, the case was reassigned to Judge Sellers (the administrative law judge). In his Decision and Order on Remand, issued on November 29, 2013, the administrative law judge noted that the only issue before him was disability causation. The administrative law judge found that Dr. Majmudar's opinion was reasoned and documented and sufficient to prove that pneumoconiosis was a substantially contributing cause of claimant's respiratory disability. The administrative

² We incorporate the procedural history of the case as set forth in *Calloway v. Island Creek Coal Co.*, BRB No. 09-0361 BLA (Nov. 27, 2009) (unpub.).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

law judge credited Dr. Majmudar's opinion over the contrary opinions of Drs. Repsher and Selby.⁴ Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in crediting Dr. Majmudar's opinion at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board. Employer has also filed a reply brief, reiterating its 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 supported by substantial evidence, is rational, and is 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).

In accordance with the instructions of the Sixth Circuit, the administrative law judge reconsidered on remand whether claimant established that coal dust exposure was a substantially contributing factor in his respiratory disability.⁵ The administrative law judge noted that Dr. Majmudar performed the examination of claimant on behalf of the Department of Labor and diagnosed chronic obstructive pulmonary disease, chronic bronchitis, and pneumoconiosis, and opined that claimant was totally disabled. Decision

⁴ The administrative law judge additionally found that Dr. Baker made contradictory statements in his report regarding the cause of claimant's respiratory disability and gave his opinion little weight. Decision and Order on Remand at 16.

⁵ The regulation at 20 C.F.R. §718.204(c)(1) provides:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in [20 C.F.R.] §718.201 is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

and Order on Remand at 5; *see* Director's Exhibit 11. The administrative law judge also noted that, in his deposition taken on December 18, 2006, Dr. Majmudar "agreed with counsel that it was a fair statement to say that the Claimant's coal dust inhalation was [a] 'predominant' cause of his pneumoconiosis and chronic obstructive pulmonary disease." Decision and Order on Remand at 5, *quoting* Claimant's Exhibit 1 at 14. The administrative law judge considered Dr. Majmudar's opinion to be sufficient to establish that claimant's "coal dust exposure was a substantially contributing cause of his totally disabling obstructive impairment, meaning that his legal pneumoconiosis was a substantially contributing cause of his total disability." Decision and Order at 21-22. The administrative law judge concluded that Dr. Majmudar's opinion was reasoned and documented and entitled to controlling weight. *Id.* at 15, 21-22, 30.

Employer asserts that Dr. Majmudar's opinion is conclusory and is not well-reasoned as a matter of law. Specifically, employer contends that Dr. Majmudar made equivocal statements as to the cause of claimant's respiratory disability and "offers bald conclusions absent any reasoning[.]" Employer's Brief in Support of Petition for Review at 10-13. Employer argues that Dr. Majmudar primarily relies on claimant's exposure to coal dust as the basis for attributing claimant's disabling obstructive respiratory impairment to coal mine employment. These arguments have no merit.

The administrative law judge noted that, in support of his opinion, Dr. Majmudar cited to claimant's reduced FEV1 and claimant's twenty years of underground coal mine dust exposure as bases for his opinion, and that Dr. Majmudar "explained that the smoking history he obtained, of approximately ten pack-years, was 'not considered a . . . very significant history.'" Decision and Order on Remand at 6, *quoting* Claimant's Exhibit 1; *see also* Director's Exhibit 11. Moreover, the administrative law judge identified the fact that Dr. Majmudar "agreed that the Claimant's pulmonary function studies did not improve after the use of bronchodilators, indicating that his severe breathing impairment was permanent and irreversible." Decision and Order on Remand at 6. The administrative law judge further observed that, "Dr. Majmudar acknowledged that smoking was also a cause of [claimant's] obstructive impairment," and that he "agreed that the Claimant's twenty years of coal dust exposure would have aggravated any obstruction due to cigarette smoking, making it worse." *Id.* at 14.

The administrative law judge specifically addressed employer's allegations that Dr. Majmudar's testimony is speculative and stated:

I am aware that Dr. Majmudar occasionally phrased his opinion in terms of appearances, using such language as "[t]hat's what it look's like" and "[it] does appear" as compared to more forceful choice of words. Although Dr. Majmudar could have used more forceful language to state his opinion, I interpret his statements in the context in which they were given, and

viewing his opinion as a whole, I consider it to be affirmative and unequivocal.

Decision and Order at 15. Contrary to employer's argument, the administrative law judge's interpretation of Dr. Majmudar's opinion was reasonable and the fact that other inferences could have been drawn on the facts of this case is immaterial. *See Bizzarri v. Consolidation Coal Co.*, 775 F.2d 751, 753, 8 BLR 2-65 (6th Cir. 1985); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, because the administrative law judge had discretion to assess the credibility of the medical opinions, and based on the explanations he provided, we affirm his finding that Dr. Majmudar's opinion is reasoned and equivocal. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

The administrative law judge also rationally found that Dr. Majmudar's opinion is "consistent with the [Department of Labor] position that both cigarette smoking and coal dust exposure cause obstructive lung disease in roughly equal measure, and that when the two sources of lung disease are present in the same person, as in the case of a miner who smokes, their effect is additive."⁶ Decision and Order on Remand at 14-15; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000). Furthermore, as the Sixth Circuit specifically noted, Dr. Majmudar's opinion is credible because he "explained that scientific literature showed

⁶ We reject employer's argument that the administrative law judge improperly considered party affiliation in weighing the conflicting medical opinions. Although the administrative law judge noted that Dr. Majmudar had no party affiliation, he did not credit his opinion on this basis. *See* Decision and Order on Remand at 13; Employer's Brief in Support of Petition for Review at 14. Rather, the administrative law judge concluded that Dr. Majmudar's opinion was better supported by the objective evidence and the medical literature cited in the preamble. Moreover, although employer maintains that Dr. Majmudar did not address the possibility of asthma, the administrative law judge specifically noted that Dr. Majmudar attributed claimant's respiratory impairment to coal dust exposure based on the absence of a *significant* bronchodilator response, and even if claimant had shown some improvement in his results after the use of a bronchodilator, "this alone would not constitute grounds for eliminating the contribution of coal dust to Claimant's fixed impairment." Decision and Order on Remand at 15; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). We also note that all of claimant's pulmonary function tests were qualifying, even after the administration of bronchodilators. *See* Judge Phalen's January 29, 2009 Decision and Order at 7.

smoking was highly unlikely to have caused [claimant's] problems" and because his opinion was "more comprehensive" than the opinions of Drs. Repsher and Selby.⁷ See *Calloway*, 460 F. App'x at 510-11.

For all of the above-stated reasons, we affirm the administrative law judge's determination that claimant established that his pneumoconiosis was a substantially contributing cause of his respiratory disability at 20 C.F.R. §718.204(c).⁸ We therefore affirm the award of benefits.

⁷ The Sixth Circuit previously rejected employer's argument, raised again in this appeal, that Dr. Majmudar's opinion is not credible because he diagnosed clinical pneumoconiosis, contrary to the preponderance of the x-ray evidence. See *Island Creek Coal Co. v. Calloway*, 460 F. App'x 504, 511 (2012) (unpub.); Employer's Brief in Support of Petition for Review at 12, 14. The court observed that Dr. Majmudar's opinion "was based on many factors besides the x-ray [reading of clinical pneumoconiosis]." *Id.* Based on the explanation provided by the court, we reject employer's contention that Dr. Majmudar's diagnosis of legal pneumoconiosis was improperly based solely on a positive x-ray reading. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

⁸ The administrative law judge rejected Dr. Repsher's disability causation opinion because he found that Dr. Repsher expressed views that are contrary to the preamble and the position of the Department of Labor (DOL) that pneumoconiosis is a permanent and progressive disease. Decision and Order on Remand at 17-18. He rejected Dr. Selby's opinion because Dr. Selby: 1) does not believe coal dust exposure can be a significant contributing factor of obstructive lung disease, contrary to the position of DOL; 2) he relied on statistical averages and not the specifics of this case; 3) he did not consider coal dust exposure as a potential cause of claimant's lung pathology; and 4) he failed to "evinced an awareness or acceptance of the causal relationship between coal dust and centrilobular emphysema." *Id.* at 19-20. Because employer does not challenge these credibility findings, they are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

JUDITH S. BOGGS
Administrative Appeals Judge