

U.S. Department of Labor

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



BRB No. 15-0023 BLA

FRANKIE E. MAYS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BELL COUNTY COAL CORPORATION)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	DATE ISSUED: 10/29/2015
)	
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 of Stephen M. Reilly, and the Order on Reconsideration of Daniel F. Solomon, Administrative Law Judges, United States Department of Labor.

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

Jeffrey S. Goldberg (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: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (10-BLA-5412) of Administrative Law Judge Stephen M. Reilly 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). Employer also appeals the Order on Reconsideration (10-BLA-5412) of Administrative Law Judge Daniel F. Solomon denying employer's request for reconsideration. This case involves a subsequent claim filed on March 6, 2009.¹

After crediting claimant with eleven years of coal mine employment,² Administrative Law Judge Stephen M. Reilly (the administrative law judge) found that the new evidence established the existence of both clinical and legal pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge further found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established that claimant is totally

¹ Claimant filed a previous claim on July 2, 2001, Director's Exhibit 1, which was finally denied on February 29, 2008, as the Board affirmed the administrative law judge's determination that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *F.E.M. [Mays] v. Bell Cnty. Coal Corp.*, BRB No. 07-0450 BLA (Feb. 29, 2008) (unpub.).

² The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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 (1989) (en banc).

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).

disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).⁴ Accordingly, the administrative law judge awarded benefits.

Employer moved for reconsideration, challenging the administrative law judge's designation of employer as the responsible operator, and his findings of pneumoconiosis and total disability due to pneumoconiosis. Because the administrative law judge was unavailable, the case was reassigned to Administrative Law Judge Daniel F. Solomon, who denied reconsideration.

On appeal, employer argues that the administrative law judge erred in identifying it as the responsible operator. Employer further contends that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Employer also challenges the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's identification of employer as the responsible operator. Further, the Director urges the Board to reject employer's argument that the administrative law judge erred in referring to the preamble of the 2001 regulatory revisions in discounting the opinions of employer's physicians regarding the cause of claimant's obstructive pulmonary impairment. In a reply brief, employer reiterates its previous contentions.⁵

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,

⁴ Because Administrative Law Judge Stephen M. Reilly (the administrative law judge) credited claimant with less than fifteen years of coal mine employment, claimant is not entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

⁵ Employer's argument that "it is not clear that the Director has standing to defend the [administrative law judge's] decision on the merits," Reply at 1, lacks merit and is rejected. See 30 U.S.C. §932(k); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 573-74, 22 BLR 2-107, 2-115-17 (6th Cir. 2000). Employer does not challenge the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b). This finding is, therefore, affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Responsible Operator

Employer, Bell County Coal Corporation (Bell), challenges its designation as the responsible operator, arguing that it was not the operator to last employ claimant for at least one year.⁶ Employer’s Brief at 17. Specifically, employer contends that because claimant was self-employed as a coal truck driver for at least one year after leaving its employ, the district director erroneously failed to notify claimant of his potential liability, or adequately investigate whether he had insurance coverage. *Id.* These challenges lack merit.

Section 725.495 addresses the burden of proof of the parties with regard to the criteria for determining the responsible operator, and specifically provides that the Director bears the burden of proving that the responsible operator initially found liable for the payment of benefits is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a), (b). The regulation also provides that in any case in which the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. To set forth a prima facie case that the most recent operators are incapable of paying benefits, the district director need only include within the record a statement that the Office of Workers’ Compensation Programs has searched its files and found no record of insurance coverage or authorization to self-insure for those operators. 20 C.F.R. §725.495(d).

The district director designated Bell as the responsible operator because claimant’s only employment after leaving Bell was as an uninsured, self-employed coal truck driver. Director’s Exhibit 24. The district director reiterated in the Proposed Decision and Order that claimant was uninsured while self-employed as a coal truck driver:

[Claimant] was employed with Bell County Coal Co. from [December of 1978 through January 4, 1982] [Claimant] earned subsequent self-employment wages in 1984 thr[ough December 31, 1985] by hauling coal for various companies. However, while [claimant’s] self-employment is considered to have been coal mine employment, a self-employed truck

⁶ Employer does not challenge the district director’s and administrative law judge’s findings that it otherwise meets the criteria of a responsible operator. *See* 20 C.F.R. §§725.491(a)(1); 725.494(b)-(e).

driver is not required to have insurance coverage and [claimant] did not voluntarily obtain such coverage. [Claimant] cannot be required to pay his own benefits should he be found eligible to receive benefits. Therefore, Bell County Coal Co. is the potentially liable responsible operator in this claim.

Director's Exhibit 57 at 11. Consistent with the district director's analysis, the administrative law judge found that "[t]here is no evidence that [claimant] . . . would be capable of paying benefits." Decision and Order at 11 n.7.

Contrary to employer's contention, the record reflects that the district director investigated whether claimant was covered by black lung insurance. Further, contrary to employer's additional contention, and as the Director notes, there is no requirement that coal transportation employers secure the payment of benefits by purchasing insurance or qualifying as a self-insurer. *See* 30 U.S.C. §932(b). Employer does not offer any evidence to meet its burden as the designated responsible operator under 20 C.F.R. §725.495(c), of proving that claimant is capable of assuming liability for the payment of benefits pursuant to 20 C.F.R. §725.494(e).⁷ We, therefore, affirm the administrative law judge's finding that employer is the responsible operator. 20 C.F.R. §725.495(a)(3).

Change in an Applicable Condition of Entitlement

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. Consequently,

⁷ The Director, Office of Workers' Compensation Programs (the Director), notes that "making [claimant] pay his own benefits would contravene the purpose of the Act: 'to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis[.]'" 30 U.S.C. §901(a). If [claimant] compensates himself, he receives no compensation at all." Director's Brief at 8 n.2.

to obtain review of the merits of his current claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(c); *see Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59, 25 BLR 2-221, 2-227-28 (6th Cir. 2013).

Employer contends that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Baker, Vuskovich, and Rosenberg. Dr. Baker diagnosed legal pneumoconiosis, in the form of “severe” chronic obstructive pulmonary disease (COPD), and chronic bronchitis, each of which he attributed to both coal mine dust exposure and cigarette smoking. Director’s Exhibit 13 at 18. Conversely, although Dr. Rosenberg also diagnosed disabling COPD, he opined that the disease was due solely to cigarette smoking. Employer’s Exhibits 2, 4. Dr. Vuskovich also diagnosed disabling COPD, but attributed the disease to smoking, asthma, and “chronically infected lungs.” Employer’s Exhibit 3 at 41.

The administrative law judge credited Dr. Baker’s diagnosis of legal pneumoconiosis, finding that the doctor’s opinion that claimant’s COPD was due to both coal mine dust exposure and smoking was consistent with scientific studies found credible by the Department of Labor (DOL) in the preamble to the revised regulations. The administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Vuskovich because he found that the doctors based their opinions on assumptions contrary to the regulations. Decision and Order at 14. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Employer contends that Dr. Baker’s opinion does not constitute “substantial[,] reliable or probative evidence” of legal pneumoconiosis. Employer’s Brief at 27. We disagree. Assuming a coal mine employment history of eleven years and a smoking history of forty-eight pack-years, Dr. Baker explained that both exposures can cause pulmonary symptoms. Director’s Exhibit 13. Dr. Baker noted that, even though claimant had not smoked during the last two years, his pulmonary condition continued to worsen. *Id.* Citing statements from the American Thoracic Society, as well as the Pulmonary Review of Respiratory Medicine by the American College of Chest Physicians, Dr. Baker explained that “[i]t is generally felt that a combination of cigarette smoking and coal dust exposure may be synergistic in their effects on the lung and [that] coal dust exposure can be as severe as cigarette smoking in terms of its effects on the lung.” Director’s Exhibit 13. Dr. Baker, therefore, specifically opined that claimant’s “condition has been significantly contributed to and substantially aggravated by dust exposure in his coal mine employment.” *Id.*

The administrative law judge permissibly accorded greater weight to Dr. Baker's opinion because he found that it is consistent with the DOL's recognition that smokers who are exposed to coal mine dust have an additive risk for developing significant obstruction. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Decision and Order at 15, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Because the administrative law judge found that Dr. Baker 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. Baker's diagnosis of legal pneumoconiosis is sufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *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); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

We reject employer's contention that the administrative law judge erred in according less weight to the opinions of Drs. Rosenberg and Vuskovich. Employer's Brief at 30-34. The administrative law judge correctly noted that Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's COPD, in part, because he found a significant reduction in claimant's FEV1/FVC ratio which, in his opinion, was inconsistent with obstruction due to coal mine dust exposure.⁸ Decision and Order at 14; Employer's Exhibit 2 at 7-8. As the Director asserts, the administrative law judge permissibly discredited Dr. Rosenberg's opinion because his reasoning for eliminating coal mine dust exposure as a source of claimant's COPD is in conflict with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.⁹ *See* 65 Fed. Reg. at 79,943; *Cent. Ohio Coal Co. v. Director, OWCP*

⁸ In attributing claimant's chronic obstructive pulmonary disease (COPD) to cigarette smoking instead of coal mine dust exposure, Dr. Rosenberg specifically opined that "preservation of the FEV1/FVC ratio is the 'norm' in patients with coal mine induced obstructive lung disease." Employer's Exhibit 2 at 7. Specific to claimant's situation, Dr. Rosenberg noted that "his FEV1 was severely reduced with a marked reduction of his FEV1/FVC ratio." *Id.* at 8. Dr. Rosenberg opined that "this pattern of obstruction is inconsistent with that related to past coal mine dust exposure," but "classic for a smoking-related form of COPD." *Id.*

⁹ Employer contends that it was denied due process because the administrative law judge "should have granted [its] request to respond to [the preamble] with proof." Employer's Brief at 29. As the Director notes, however, employer "had ample

[*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Adams*, 694 F.3d 798, at 801-02, 25 BLR at 210-11; Decision and Order at 14, 17. The administrative law judge also accurately noted that the DOL has recognized that the medical literature “support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms” Decision and Order at 14, *citing* 65 Fed. Reg. at 79,943. In light of this accepted principle, the administrative law judge permissibly found that Dr. Rosenberg’s opinion, that claimant’s obstructive impairment is unrelated to coal mine dust exposure, was not well-reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

In regard to Dr. Vuskovich’s opinion that claimant’s COPD was not due to his coal mine dust exposure, the administrative law judge accurately noted that the doctor relied, in part, on the fact that claimant’s exposure to coal mine dust ended in 1985, but his pulmonary impairment did not develop until 2001. Decision and Order at 14; Employer’s Exhibit 3 at 40. The administrative law judge permissibly discredited that reasoning as inconsistent with DOL’s recognition that pneumoconiosis is “a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.” 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); Decision and Order at 14. We therefore affirm, as supported by substantial evidence, the administrative law judge’s finding that the opinions of Drs. Rosenberg and Vuskovich were entitled to little weight.¹⁰ Decision and Order at 14. Consequently, we affirm the administrative law

opportunity to develop evidence questioning the preamble as it wished.” Director’s Brief at 12. Moreover, employer does not challenge the substance of the Department of Labor’s (DOL’s) position as articulated in the regulation’s preamble, that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. In order to do so, employer would have to submit “the type and quality of medical evidence that would invalidate the DOL’s position in that scientific dispute.” *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014)(internal quotation marks omitted). Employer has presented no such evidence.

¹⁰ Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Rosenberg and Vuskovich, which we have affirmed, we need not address employer’s remaining arguments regarding the weight accorded to those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

judge's conclusion that the new medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD arising out of coal mine employment, pursuant to 20 C.F.R. 718.202(a)(4). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Accordingly, we also affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

As employer raises no other contentions regarding the administrative law judge's findings on the issue of legal pneumoconiosis,¹¹ we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD due, in part, to coal mine dust exposure.¹² 20 C.F.R. §718.202(a)(4).

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 34. We disagree.

Pneumoconiosis is a substantially contributing cause of a miner's total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "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)(i),(ii). It is undisputed that claimant is totally disabled by his COPD. As we held above, the administrative law judge permissibly relied on Dr. Baker's opinion to

¹¹ The administrative law judge noted that the record contains evidence submitted in connection with claimant's previous 2001 claim. However, the administrative law judge reasonably relied upon the more recent evidence, which he found more accurately reflects claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 15.

¹² Because we affirm the administrative law judge's finding that claimant suffers from legal pneumoconiosis, we need not address employer's argument that the administrative law judge erred in determining that the evidence also established the existence of clinical pneumoconiosis, as error, if any, would be harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

find that claimant established the existence of legal pneumoconiosis, in the form of a disabling COPD due, in part, to coal mine dust exposure. Contrary to employer's contention, the administrative law judge rationally found that Dr. Baker's opinion also supported a finding that legal pneumoconiosis is a "substantially contributing cause" of claimant's total disability, pursuant to 20 C.F.R. §718.204(c).¹³ See *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599, 25 BLR 2-615, 2-624 (6th Cir. 2014); *Banks*, 690 F.3d at 490, 25 BLR at 2-154-55; Decision and Order at 16-17. Moreover, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Vuskovich because

¹³ Dr. Baker opined that although claimant's pulmonary disability "is due predominantly to his cigarette smoking . . . his coal dust exposure has been a significantly contributing agent as well in his pulmonary condition." Director's Exhibit 13 at 19. Dr. Baker additionally stated that claimant's legal pneumoconiosis contributes "fully" to his disabling pulmonary impairment. *Id.* at 18.

they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that the evidence established the presence of the disease. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *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); Decision and Order at 17. Consequently, we affirm the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), we affirm the award of benefits.

Accordingly, the Decision and Order awarding benefits and the Order on Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge