

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0462 BLA

DENNIS M. LLOYD)

Claimant-Respondent)

v.)

PANTHER BRANCH COAL COMPANY,)
d/b/a LONG BRANCH ENERGY)

and)

BRICKSTREET MUTUAL INSURANCE)
COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 07/31/2020

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris,
Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk, Beckley, West Virginia, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC),
Morgantown, West Virginia, for Employer/Carrier.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Lystra A. Harris's Decision and Order Awarding Benefits (2017-BLA-05585) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on May 6, 2014.

The administrative law judge credited Claimant with 14.93 years of underground coal mine employment and therefore found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).¹ Considering whether Claimant established entitlement to benefits without the benefit of this presumption, the administrative law judge found the evidence established the existence of legal pneumoconiosis,² a totally disabling respiratory impairment, and total disability due to pneumoconiosis.³ 20 C.F.R. §§718.202(a)(4); 718.204(b), (c); 725.309(c). She therefore awarded benefits.

On appeal, Employer challenges the administrative law judge's findings that Claimant established legal pneumoconiosis and total disability due to pneumoconiosis.

¹ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

² "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

³ The administrative law judge found Claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202. She also found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁴

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 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).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The administrative law judge considered the opinions of Drs. Zaldivar, Castle, Rasmussen, and Forehand. Dr. Zaldivar opined Claimant does not have legal pneumoconiosis but suffers from asthma and emphysema due to cigarette smoking.⁶ Director's Exhibit 24; Employer's Exhibit 12 at 32, 42. Dr. Castle similarly opined

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established total disability. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28, 32-33.

⁵ The Board will apply the law of the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 9; Hearing Transcript at 16, 28.

⁶ Dr. Zaldivar examined Claimant on April 24, 2015, and provided deposition testimony on May 7, 2018. Director's Exhibit 24; Employer's Exhibit 12.

Claimant does not have legal pneumoconiosis but has an obstructive impairment due to tobacco smoke-induced emphysema with an asthmatic component.⁷ Employer's Exhibits 4 at 11; 13 at 18. In contrast, Dr. Rasmussen opined Claimant has legal pneumoconiosis in the form of chronic obstructive lung disease (COPD)/emphysema caused by his coal mine dust exposure and smoking history. Director's Exhibit 20; Claimant's Exhibit 2. Dr. Forehand also attributed Claimant's obstructive lung disease to both coal mine dust exposure and smoking. Claimant's Exhibit 2.

The administrated law judge initially found while Drs. Zaldivar, Castle, and Rasmussen are similarly highly qualified, Dr. Forehand did not have the same level of experience. Decision and Order at 24. The administrative law judge discredited, however, the opinions of Drs. Zaldivar and Castle as inadequately explained. She also discredited Dr. Rasmussen's opinion, finding he relied on an inflated coal mine employment history. In contrast, she found Dr. Forehand's opinion well-reasoned, well-documented, and sufficient to establish legal pneumoconiosis. Decision and Order at 26, 28.

We reject Employer's contention the administrative law judge erred in discrediting Dr. Zaldivar's opinion. Employer's Brief at 9, 13-14, 16. Dr. Zaldivar opined Claimant's smoking history "is sufficient in itself to cause severe impairment of airway obstruction due to emphysema" and the bronchospasm demonstrated by pulmonary function testing "is far more in favor of tobacco smoke being responsible for the airway obstruction than coal dust." Director's Exhibit 24. He further described Claimant's impairment as asthma/COPD overlap, which he concluded was due to smoking and genetic factors, noting coal dust does not cause asthma.⁸ Employer's Exhibit 24.

⁷ Dr. Castle provided medical records reviews on June 2, 2017, and August 11, 2018. Employer's Exhibits 4, 13.

⁸ Dr. Zaldivar stated:

Given that smoking does cause bronchospasm and asthma, but neither coal nor silica do, the bronchospastic reaction demonstrated by Dr. Rasmussen, in addition to the severity of the airway obstruction, means that [Claimant] in fact has asthma, as well as emphysema combined, and this was at least in part the result of his smoking habit.

Director's Exhibit 24. Dr. Zaldivar added asthma and emphysema are also related to genetic susceptibility while coal workers' pneumoconiosis is not. Employer's Exhibit 12 at 40-41.

Contrary to Employer's argument, the administrative law judge permissibly found the probative value of Dr. Zaldivar's opinion diminished, in part, because he did not provide any support for his attribution of Claimant's asthma to genetic factors.⁹ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-34 (4th Cir. 1998); Decision and Order at 25; Employer's Brief at 9-10. Further, in light of the Department of Labor's recognition that the effects of smoking and coal dust exposure are additive, the administrative law judge permissibly found Dr. Zaldivar failed to adequately explain why Claimant's coal mine dust exposure¹⁰ did not significantly contribute, along with his asthma and smoking, to his COPD/emphysema.¹¹ See 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 24-25.

We further reject Employer's contention the administrative law judge erred in discrediting Dr. Castle's opinion that Claimant's obstructive impairment is due entirely to smoking-induced pulmonary emphysema with an asthmatic component. Employer's Brief at 9-10, 16, 19. Dr. Castle stated while Claimant had sufficient coal mine employment to develop legal pneumoconiosis, his tobacco abuse, cardiac disease, and obesity were also risk factors for the development of his severe emphysema. Employer's Exhibit 4 at 9. He stated he could differentiate between the effects of coal mine dust and smoking, noting bronchoreversibility and reduced diffusing capacity are characteristic of smoking-induced disease. *Id.* at 10. Because Dr. Rasmussen's pulmonary function testing demonstrated Claimant has "severe airway obstruction with partial reversibility"¹² and reduced diffusing

⁹ Claimant denied a history of asthma to Dr. Zaldivar. Further, Dr. Zaldivar acknowledged he did not have access to Claimant's genetic or DNA markers. Employer's Exhibit 12 at 40.

¹⁰ Dr. Zaldivar acknowledged Claimant has a "significant" coal mine dust-exposure history. Employer's Exhibit 12 at 15.

¹¹ As the administrative law judge provided valid reasons for according less weight to Dr. Zaldivar's opinion, we find any error in according his opinion less weight for other reasons would be harmless. 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 his opinion. Employer Brief at 13-16.

¹² Dr. Rasmussen's July 9, 2014 pulmonary function study produced qualifying values even after the administration of a bronchodilator. Director's Exhibit 20. A "qualifying" pulmonary function study yields values that are equal to or less than the

capacity, Dr. Castle attributed his obstruction entirely to cigarette smoking. *Id.* at 10. The administrative law judge permissibly found that Dr. Castle’s opinion, like Dr. Zaldivar’s, is entitled to minimal weight because he did not explain why Claimant’s coal mine dust exposure was not an additive factor, along with his smoking, to his emphysema.¹³ *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. at 79,940; *Stallard*, 876 F.3d at 671-72; *Owens*, 724 F.3d at 558; *Consolidation Coal Co. v. Swiger*, 98 F. App’x 227, 237 (4th Cir. 2004) (administrative law judge permissibly found presence of a disabling residual impairment suggests a combination of factors caused the condition); Decision and Order at 25.

Because the administrative law judge recognized Drs. Zaldivar and Castle provided multiple reasons to support their opinions that Claimant does not have legal pneumoconiosis, we further reject Employer’s argument that the administrative law judge selectively considered their opinions or failed to address their opinions in their entirety.¹⁴ *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order at 16-22, 24-25; Employer’s Brief at 12-13.

Employer next argues the administrative law judge erred in finding Dr. Forehand’s opinion reasoned, asserting she “made no findings” about the specific factors Dr. Forehand provided to support his opinion Claimant has legal pneumoconiosis. Employer’s Brief at 20. Contrary to Employer’s argument, the administrative law judge observed, in concluding coal mine dust substantially contributed to Claimant’s obstructive impairment, Dr. Forehand relied on a reasonable coal mine employment history of “17+ years working

appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. A “non-qualifying” study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(i).

¹³ Because the administrative law judge provided a valid reason for according less weight to Dr. Castle’s opinion, any error in according his opinion less weight for other reasons would be harmless. *See Kozele*, 6 BLR at 1-382 n.4. Therefore, we need not address Employer’s remaining arguments regarding the weight accorded to his opinion. Employer Brief at 16-19.

¹⁴ Employer also states the Administrative Procedure Act (APA) requires the administrative law judge to consider all relevant evidence and explain her findings, but does not identify how she failed to do so. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Employer’s Brief at 12-13, *citing* 5 U.S.C. §557(c)(3)(A) (2018). Likewise Employer asserts the administrative law judge substituted her opinion for an expert’s opinion by interpreting medical data, but does not identify what medical data she purportedly interpreted improperly. *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109; Employer’s Brief at 13.

at the face of underground mines, where levels of freshly cut silica and coal dust are highest.” Decision and Order at 23, 25; Employer’s Exhibit 2 at 5. Further, she noted Dr. Forehand’s explanation that the presence of “very significant fixed irreversible . . . airway obstruction” shown on his pulmonary function study also implicated coal mine dust as a cause, because coal mine dust causes irreversible lung disease.¹⁵ Claimant’s Exhibit 2 at 3, 4. Because the administrative law judge found Dr. Forehand based his opinion on Claimant’s pulmonary function studies and smoking and coal mine employment histories, and explained why he concluded Claimant’s disabling COPD is due to both his smoking and coal dust exposure, we affirm the administrative law judge’s permissible finding that his opinion is “well-reasoned and well documented.” *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the administrative law judge did and why, the duty of explanation under the APA is satisfied); *see Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 25.

Nor is there merit to Employer’s assertions the administrative law judge erred in relying on Dr. Forehand’s opinion to find legal pneumoconiosis established, given her finding he was not as highly credentialed as the other physicians of record. Employer’s Brief at 15. Contrary to Employer’s argument, having discredited the contrary opinions as unreasoned, the administrative law judge permissibly found Dr. Forehand’s credible opinion sufficient to establish Claimant has legal pneumoconiosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 25-26, 28.

Because it is supported by substantial evidence, the administrative law judge’s finding that the medical opinion evidence establishes the existence of legal pneumoconiosis is affirmed. We further affirm her finding that all of the evidence of record, when weighed together, establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).¹⁶ *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000); Decision and Order at 28.

¹⁵ Dr. Zaldivar also opined impairment due to coal dust-induced lung disease is permanent and irreversible. Employer’s Exhibit 12 at 25.

¹⁶ Having found the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found 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 28.

Disability Causation

A miner is totally disabled due to pneumoconiosis if it substantially contributes to a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis “substantially contributes” 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); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

The administrative law judge correctly noted Drs. Zaldivar and Castle opined legal pneumoconiosis played no role in Claimant’s disability. Decision and Order at 33; Director’s Exhibit 24; Employer’s Exhibits 4, 12, 13. In contrast, Dr. Rasmussen opined legal pneumoconiosis is a substantially contributing cause of his disability. Decision and Order at 33; Director’s Exhibit 20. Finally, she found Dr. Forehand was “more ambiguous” and did not explicitly address the issue. Decision and Order at 33; Claimant’s Exhibit 2. The administrative law judge discredited the opinions of Drs. Zaldivar and Castle, and she credited the opinion of Dr. Rasmussen to find disability causation established. Decision and Order at 33-34.

Contrary to Employer’s argument, the administrative law judge permissibly found the opinions of Drs. Zaldivar and Castle entitled to little weight because they did not diagnose legal pneumoconiosis, contrary to her finding. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge “may not credit” that physician’s opinion on causation absent “specific and persuasive reasons,” in which case the opinion is entitled to at most “little weight”); Decision and Order at 33; Employer’s Brief at 16-18.

Nor is there merit to Employer’s assertion that having discredited Dr. Rasmussen’s diagnosis of legal pneumoconiosis, the administrative law judge erred in crediting his opinion at disability causation. Employer’s Brief at 11, 22. The administrative law judge acknowledged she found Dr. Rasmussen’s opinion insufficient to establish legal pneumoconiosis because he relied on an inflated coal mine employment history. Decision and Order at 33. She accurately observed, however, his diagnosis was nonetheless

accurate, supported by the credible evidence of record, and consistent with her finding. Decision and Order at 33-34. Thus, contrary to Employer's contention, she permissibly found the flaw in his legal pneumoconiosis diagnosis does not undermine his opinion Claimant's disabling impairment is due to legal pneumoconiosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Moreover, while the administrative law judge found Dr. Forehand's opinion "ambiguous" because he did not "explicitly say" Claimant's disability is due to legal pneumoconiosis, she acknowledged his opinion "effectively . . . links the legal pneumoconiosis and total disability together."¹⁷ Decision and Order at 33.

We therefore affirm the administrative law judge's determination to credit Dr. Rasmussen's opinion at disability causation.

As substantial evidence supports the administrative law judge's determination that Claimant established total disability causation, it is affirmed. 20 C.F.R. §718.204(c); *see Compton*, 211 F.3d at 207-08; *Hicks*, 138 F.3d at 528.

¹⁷ As the administrative law judge observed, Dr. Forehand stated Claimant's overall medical record establishes legal pneumoconiosis "in the form of a coal mine dust-related lung disease (obstructive lung disease) and a totally disabling respiratory impairment," which "would prevent [Claimant] from returning to his last coal mining job." Decision and Order at 33 n.42, *quoting* Claimant's Exhibit 2 at 5.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge