



BRB No. 20-0071 BLA

BUCKY SCOTT)

Claimant-Respondent)

v.)

EASTERN COAL CORPORATION, c/o)

HEALTHSMART CASUALTY CLAIMS)

SOLUTIONS)

and)

DATE ISSUED: 11/30/2020

Self-Insured through THE PITTSTON)

COMPANY, c/o HEALTHSMART)

CASUALTY CLAIMS SOLUTIONS)

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 Awarding Benefits of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Lois A Kitts & James M. Kennedy (Baird and Baird, P.S.C.), Pikeville,
Kentucky, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD, and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-05401) rendered on a claim filed on September 11, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 13.44 years of underground coal mine employment and thus found he could not invoke the 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 Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found he established the existence of clinical and legal pneumoconiosis,² and total disability due to both forms of the disease. 20 C.F.R. §§718.202(a)(4); 718.204(b), (c); 725.309(c). Accordingly, the administrative law judge awarded benefits.

On appeal, Employer challenges the administrative law judge's determination that Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. Neither Claimant nor the Director, Office of Workers' Compensation Programs, have filed response briefs.

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.³ 33 U.S.C. §921(b)(3), as incorporated

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

² 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 tissue 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).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16.

by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Without the Section 411(c)(3)⁴ or (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);⁵ 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).

Clinical Pneumoconiosis

The administrative law judge considered seven interpretations of three x-rays. Decision and Order at 20-21. All of the interpreting physicians are dually qualified Board-certified radiologists and B readers. *Id.* at 20. Drs. DePonte and Miller read the December 16, 2015 x-ray as positive for pneumoconiosis, while Dr. Adcock read it as negative.⁶ Director’s Exhibits 11, 19, 20. Dr. DePonte read the March 8, 2017 x-ray as positive for pneumoconiosis, while Dr. Adcock read it as negative. Claimant’s Exhibit 1; Employer’s Exhibit 1. Dr. DePonte read the June 28, 2018 x-ray as positive for pneumoconiosis, while Dr. Kendall read it as negative. Claimant’s Exhibit 2; Employer’s Exhibit 4.

The administrative law judge found the December 16, 2015 x-ray positive for pneumoconiosis based on the preponderance of positive readings and the March 8, 2017 and June 28, 2018 x-rays in equipoise. Decision and Order at 20. He thus concluded the x-ray evidence establishes clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 20-21.

⁴ Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

⁵ We affirm, as unchallenged on appeal, the administrative law judge’s finding that Claimant established total disability. *See* 20 C.F.R. §718.204(b)(2); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 36.

⁶ Dr. Lundberg interpreted the December 16, 2015 x-ray for quality only. Director’s Exhibit 16.

Employer contends the administrative law judge erred in finding the December 6, 2015 x-ray positive for pneumoconiosis and the March 8, 2017 x-ray in equipoise, without considering Dr. Adcock's "prestigious academic qualifications in radiology." Employer's Brief at 12-13. We disagree. While an administrative law judge may assign greater weight to the x-ray interpretation of one physician over another, based on their academic appointments, he is not required to do so. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

The administrative law judge properly conducted both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the physicians' radiological qualifications, and permissibly found the December 6, 2015 x-ray positive for pneumoconiosis and the March 8, 2017 and June 28, 2018 x-rays in equipoise. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 20. We affirm the administrative law judge's finding Claimant established clinical pneumoconiosis as supported by substantial evidence. 20 C.F.R. §718.202(a)(1); Decision and Order at 20.

The administrative law judge also credited Dr. Ajjarapu's opinion that Claimant has clinical pneumoconiosis over the contrary opinions of Drs. Rosenberg and Vuskovich. He specifically found Drs. Rosenberg and Vuskovich relied on negative x-ray readings, contrary to his finding that the x-ray evidence, as a whole, is either positive or inconclusive for clinical pneumoconiosis. Decision and Order at 21-23; Director's Exhibit 23; Employer's Exhibits 2, 12.

Employer asserts the administrative law judge's erroneous weighing of the x-ray evidence "tainted" his weighing of the medical opinions. Employer's Brief at 14-15. Because we have affirmed the administrative law judge's finding Claimant established clinical pneumoconiosis by x-ray, we reject Employer's argument. We therefore affirm the administrative law judge's finding that Claimant established clinical pneumoconiosis based on Dr. Ajjarapu's opinion. 20 C.F.R. §718.202(a)(4); Decision and Order at 23; Director's Exhibit 11. We further affirm the administrative law judge's overall determination that Claimant satisfied his burden to establish he has clinical pneumoconiosis.⁷ 20 C.F.R. §718.202(a); Decision and Order at 23.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust

⁷ The administrative law judge found there is no biopsy evidence. 20 C.F.R. §718.202(a)(2).

exposure in coal mine employment.” 20 C.F.R. §718.201(b). The United States Court of Appeals for the Sixth Circuit holds a miner can establish his lung impairment is significantly related to coal mine dust exposure “by showing that his disease was caused ‘in part’ by coal mine employment.” *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

Dr. Ajjarapu diagnosed chronic bronchitis due to coal mine dust exposure. Director’s Exhibits 11, 25. She also opined Claimant has a disabling respiratory impairment due, in part, to coal mine employment. Director’s Exhibit 25. Dr. Rosenberg opined Claimant has a respiratory impairment unrelated to coal mine dust exposure. Director’s Exhibit 23. Dr. Vuskovich indicated there are no valid test results in the pulmonary function studies he reviewed to assess whether Claimant has a respiratory or pulmonary impairment. Employer’s Exhibits 2, 3. The administrative law judge credited Dr. Ajjarapu’s opinion that claimant has legal pneumoconiosis over the contrary opinions. Decision and Order at 26.

Employer contends Dr. Ajjarapu’s opinion does not prove legal pneumoconiosis because she “did not sufficiently link [Claimant’s] pulmonary conditions to [his] coal mine work that ended in 1985.” Employer’s Brief at 15. We disagree. As the administrative law judge noted, Dr. Ajjarapu conducted the Department of Labor’s complete pulmonary evaluation of Claimant. Director’s Exhibit 11. She obtained an x-ray, considered his symptoms, coal mine employment history, lack of smoking history, medical history and obtained valid pulmonary function and arterial blood gas studies. *Id.* She diagnosed legal pneumoconiosis in the form of chronic bronchitis based on his symptoms of shortness of breath, cough, and sputum production. *Id.* at 7. She specifically explained that “coal dust causes airway inflammation, which leads to bronchospasm and results in excessive airway secretions and bronchitis symptoms.” *Id.* Based on the pulmonary function study results, Dr. Ajjarapu also opined Claimant has a disabling respiratory impairment that is “due, in part, to his work in the coal mines.”⁸ *Id.* at 8. Because the administrative law judge permissibly found Dr. Ajjarapu’s opinion reasoned and documented, we affirm his determination that it supports a finding that Claimant has legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir.

⁸ In a supplemental report, Dr. Ajjarapu summarized the findings from her examination and prior report and reiterated Claimant has clinical and legal pneumoconiosis. Director’s Exhibit 25. She stated that Claimant is “totally and completely disabled based on his x-ray, reported symptoms, and pulmonary function test.” *Id.* She noted that while Claimant did not report any smoking history, he did report coronary artery disease, but it did not “seem to play a role here currently.” *Id.*

1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 24.

We also reject Employer's contentions regarding its medical experts. Employer's Brief at 17-18. As the administrative law judge accurately noted, Dr. Rosenberg stated in his medical report that Claimant "does not have airflow obstruction for consideration of legal pneumoconiosis." Director's Exhibit 23 at 20. The administrative law judge permissibly found, however, that Dr. Rosenberg's statement "contradicts his own written impression of the pulmonary function test he conducted" as showing "[s]evere obstruction, moderate-severe restriction." Decision and Order at 25, *quoting* Director's Exhibit 23 at 3; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Dr. Vuskovich opined that Claimant does not have legal pneumoconiosis because he concluded that the five pulmonary function studies he reviewed in preparing his consultative report were invalid. Employer's Exhibits 2, 3. Because the administrative law judge discredited Dr. Vuskovich's opinion regarding the validity of all but one of those studies, he found Dr. Vuskovich's opinion entitled to little weight on legal pneumoconiosis. Decision and Order at 25.

Although Employer does not challenge the administrative law judge's finding that Claimant established total disability, it generally contends the administrative law judge erred in relying on technicians' notations of Claimant's good effort and in discrediting Dr. Vuskovich's opinion the studies are invalid based on "recognized medical standards."⁹ Employer's Brief at 20. The administrative law judge, however, found that Dr. Vuskovich did not adequately explain his opinion in view of the quality standards at Appendix B, Part 718. Decision and Order at 29-31. Employer has not identified any error in that finding. We therefore affirm the administrative law judge's determination that Dr. Vuskovich's opinion on legal pneumoconiosis is not credible because his views regarding the validity of the pulmonary function studies are contrary to the administrative law judge's findings.¹⁰ *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 26.

⁹ Employer contends Dr. Vuskovich's opinion establishes the pulmonary function studies conducted on August 6, 2015, December 16, 2015, March 8, 2017, and June 28, 2018, are invalid. Employer's Brief at 20.

¹⁰ The administrative law judge correctly noted that no physician invalidated the most recent qualifying pulmonary function studies obtained on August 30, 2018. Decision and Order at 34. Thus, notwithstanding Employer's assertions on appeal, the administrative law judge permissibly rejected Dr. Vuskovich's opinion on legal pneumoconiosis because he did not address whether Claimant had an impairment related

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge acted within his discretion in crediting Dr. Ajjarapu's opinion over Drs. Rosenberg's and Vuskovich's opinions, we affirm his determination that Claimant established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 27.

Disability Causation

To establish he is totally disabled due to pneumoconiosis, Claimant must establish pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). The administrative law judge found Dr. Ajjarapu's opinion that Claimant has a disabling respiratory impairment, due in part, to coal mine dust exposure sufficient to establish disability causation. Decision and Order at 38; Director's Exhibit 25. Employer raises no specific allegations of error regarding the administrative law judge's crediting of Dr. Ajjarapu's opinion on disability causation other than its contention Claimant does not have pneumoconiosis, which we have rejected. Additionally, the administrative law judge permissibly rejected Drs. Rosenberg's and Vuskovich's opinions on the cause of Claimant's respiratory disability, because he found no reason to conclude their opinions on disability causation did not rest on their view Claimant did not have either clinical or legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 38. We therefore affirm the administrative law judge's finding that Claimant established total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 38.

to coal mine dust exposure based on the results of the August 30, 2018 study. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 35.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge