

BRB No. 08-0513 BLA

E.A.H.)
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 Claimant-Respondent)
)
 v.)
)
 PEABODY COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 04/16/2009
)
 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 Award of Benefits of Daniel F. Solomon,
Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, P.S.C.), Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2007-BLA-05542)
of Daniel F. Solomon (the administrative law judge) on a subsequent miner's claim filed
on June 9, 2006, pursuant to the provisions of Title IV of the Federal Coal Mine Health
and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Director's Exhibit
3-1. Employer stipulated that claimant had at least twenty-three years of coal mine

employment, that it was the responsible operator, and that claimant had pneumoconiosis that arose out of coal mine employment.¹ Decision and Order at 2. In addition to accepting employer's stipulations, the administrative law judge found that the existence of legal pneumoconiosis² was established pursuant to 20 C.F.R. §718.202(a)(4), and that claimant's pneumoconiosis was due, in part, to coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 6. Further, the administrative law judge found that total respiratory disability was established by the blood gas study evidence and the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and that total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding legal pneumoconiosis established at Section 718.202(a)(4), erred in finding total respiratory disability established at Section 718.204(b)(2)(ii), (iv), and erred in finding disability causation established at Section 718.204(c). Claimant responds, contending that, since employer conceded that the existence of clinical pneumoconiosis was established by x-ray evidence at Section 718.202(a)(1), employer's argument that the administrative law judge erred in finding legal pneumoconiosis established at Section 718.202(a)(4) is irrelevant. Claimant further argues that the administrative law judge's findings are supported by the record and should be affirmed. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.

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, and in accordance with applicable law.³ 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).

¹ Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1.

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). "Arising out of coal mine employment" refers to "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 This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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(d). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Claimant’s prior claim was denied because he failed to establish any element of entitlement. Consequently, claimant had to submit new evidence establishing at least one of the applicable elements of entitlement, 20 C.F.R. §725.309(d)(2), (3); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), in order to have his claim considered on the merits. In this case, employer stipulated to the existence of clinical pneumoconiosis and that it arose out of coal mine employment. Accordingly, the administrative law judge properly considered the claim on the merits.

Employer first contends that the administrative law judge erred in finding the existence of legal pneumoconiosis established at Section 718.202(a)(4), based on his evaluation of the medical opinion evidence. Section 718.202(a), however, provides alternative methods by which a claimant may establish the existence of pneumoconiosis. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). Thus, because employer stipulated to the existence of clinical pneumoconiosis by x-ray evidence at Section 718.202(a)(1), the administrative law judge properly found the existence of pneumoconiosis was established at Section 718.202(a) and that a change in one of the applicable conditions of entitlement was, therefore, established at Section 725.309. Any errors made by the administrative law judge in finding legal pneumoconiosis established would not, therefore, affect the administrative law judge’s finding of pneumoconiosis at Section 718.202(a). *See Dixon*, 8 BLR at 1-345. However, the administrative law judge’s errors at Section 718.202(a)(4), if any, might affect his finding that claimant’s total respiratory disability was due to pneumoconiosis at Section 718.204(c)(disability causation). Consequently, we will address employer’s arguments concerning the issue of legal pneumoconiosis.

Employer argues that the administrative law judge erred in crediting the opinion of Dr. Baker over the contrary opinion of Dr. Repsher, to find legal pneumoconiosis established. Specifically, employer contends that the administrative law judge erred when he stated that Dr. Repsher did not comment on the existence of legal pneumoconiosis⁴ when, in fact, Dr. Repsher specifically opined that claimant did not have a pulmonary disease or impairment that was caused or aggravated by coal mine dust exposure. Employer notes that Dr. Repsher explained that there was no evidence of any

⁴ Employer acknowledges that Dr. Repsher diagnosed the existence of clinical pneumoconiosis by x-ray evidence. Employer’s Brief at 6.

work-related disease or impairment on claimant's pulmonary function study and that the abnormal findings on claimant's blood gas studies were caused by smoking-related heart disease, rather than lung disease.

In discussing Dr. Repsher's opinion, the administrative law judge stated: "Dr. Repsher did not comment on legal pneumoconiosis, but did note that the blood gasses (sic) were qualifying." Decision and Order at 6. As employer asserts, however, Dr. Repsher found that claimant did not have a "clinically significant pulmonary impairment." Director's Exhibit 19. Rather, Dr. Repsher opined that all of claimant's "impairments" were due to cigarette smoking and congestive heart failure. *Id.* Specifically, Dr. Repsher opined that claimant had:

[o]ther serious and potentially serious diseases and conditions ... none of these could be fairly attributed to his work as a coal miner with exposure to coal mine dust. Rather, these are diseases and conditions of the general population, which are primarily related to heredity and lifestyle factors.⁵

Id. The administrative law judge mischaracterized Dr. Repsher's findings, which are relevant to the issues of legal pneumoconiosis and disability causation. Accordingly, we vacate the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4). On remand, the administrative law judge must reconsider Dr. Repsher's opinion on the issue of legal pneumoconiosis, as it is relevant to the administrative law judge's finding on disability causation at Section 718.204(c).⁶

Employer also argues that the administrative law judge erred in crediting the opinion of Dr. Baker, finding legal pneumoconiosis, because it was equivocal, *i.e.*, Dr. Baker stated only that claimant had "possible" legal pneumoconiosis. In addition, employer asserts that the administrative law judge erred in relying on Dr. Baker's opinion to find legal pneumoconiosis, without discussing whether Dr. Baker opined that claimant's "particular" pulmonary disease was related to coal mine employment, as opposed to assuming that any pulmonary disease is related to coal mine employment.

⁵ Dr. Repsher diagnosed coronary artery disease, obesity, hypertension, mild chronic renal failure, peripheral vascular disease and prostate cancer. Director's Exhibit 19.

⁶ In addressing disability causation at Section 718.204(c), the administrative law judge noted that he would not fully credit any opinion Dr. Repsher might have on disability causation, as Dr. Repsher failed to find total disability or legal pneumoconiosis. Decision and Order at 10.

In finding that legal pneumoconiosis was established, the administrative law judge found that Dr. Baker rendered a reasoned opinion on the issue of legal pneumoconiosis, because his finding was based on his examinations and observations of claimant, and laboratory findings. Decision and Order at 6. The administrative law judge further noted that, on deposition, Dr. Baker testified that claimant had legal pneumoconiosis: because his chronic obstructive pulmonary disease (COPD) was aggravated by his lengthy coal dust inhalation of twenty-three and one-half years; because cigarette smoking and coal mine employment produced “synergistic effects” resulting in COPD; and because his opinion was supported by medical studies to that effect. *Id.*; Claimant’s Exhibit 1 at 15-16.

As employer contends, however, the administrative law judge did not address: the equivocal nature of Dr. Baker’s opinion; how Dr. Baker’s findings and the medical studies to which he referred supported his conclusions; or whether Dr. Baker sufficiently explained how claimant’s “particular” case of COPD was, in fact, due to coal mine employment. *See e.g. Eastover Mining Co. v. Williams*, 338 F.3d 501, 515, 22 BLR 2-625, 651 (6th Cir. 2003) (rejecting the notion that the mere existence of coal mine employment and a chronic obstructive pulmonary disease constitutes legal pneumoconiosis); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Collins v. J & L Steel (LTV Steel)*, 21 BLR 1-182, 189 (1999). On remand, therefore, the administrative law judge must explain how Dr. Baker’s opinion supports a finding of legal pneumoconiosis.

In conclusion, we vacate the administrative law judge’s finding of legal pneumoconiosis at Section 718.202(a)(4).⁷ On remand, the administrative law judge must reconsider whether the medical opinions establish the existence of legal

⁷ Employer also contends that the administrative law judge erred in applying the presumption that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), based on the length of claimant’s coal mine employment, to relieve claimant of the burden of establishing legal pneumoconiosis. Employer’s Brief at 14. Employer is correct that in order to establish legal pneumoconiosis claimant bears the burden of establishing that his chronic obstructive pulmonary disease arose out of coal mine employment. 20 C.F.R. §718.201. However, in this case, inasmuch as employer conceded the existence of clinical pneumoconiosis, claimant is entitled to the presumption that it arose out of coal mine employment, based on his length of coal mine employment. 20 C.F.R. §718.203(b).

pneumoconiosis and then address the impact of that finding on disability causation at Section 718.204(c).⁸

Employer next argues that the administrative law judge erred in finding that the blood gas study evidence established a totally disabling respiratory impairment at Section 718.204(b)(2)(ii). Specifically, employer argues that the administrative law judge did not sufficiently discuss the blood gas study evidence before finding that it established total respiratory disability, and did not consider physicians' statements attributing claimant's blood gas study results to the effects of smoking-related heart disease, rather than coal mine employment.

In finding that the blood gas study evidence established total disability at Section 718.204(b)(2)(ii), the administrative law judge credited the qualifying blood gas studies conducted by Drs. Baker and Repsher over the non-qualifying study of Dr. Simpao. The administrative law judge specifically noted that the two qualifying studies were conducted in October and November of 2006 by Board-certified pulmonologists, while the non-qualifying study was conducted in June of 2006, by a physician who was not a Board-certified pulmonologist. Decision and Order at 7.

Employer contends, however, that the qualifying studies did not establish total respiratory disability because Dr. Repsher stated that the blood gas study results were due to claimant's congestive heart failure. Director's Exhibit 19-4. Employer's argument that the blood gas study results show a disability from heart disease, not coal mine employment, does not, however, preclude the administrative law judge from finding that total disability was established at Section 718.204(b)(2)(ii), based on the fact that a preponderance of the blood gas studies resulted in qualifying values.⁹ 20 C.F.R. §718.204(b)(2)(ii); see *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987). The administrative law judge's finding that total disability was established at Section 718.204(b)(2)(ii) is, accordingly, affirmed.

⁸ The administrative law judge noted that Dr. Simpao found the existence of legal pneumoconiosis. Decision and Order at 6; Claimant's Exhibit 3. As employer asserts, however, the administrative law judge did not discuss Dr. Simpao's opinion, along with the opinions of Drs. Repsher and Baker, when he determined that Dr. Baker's opinion established legal pneumoconiosis. On remand, therefore, the administrative law judge must consider Dr. Simpao's opinion, along with the opinions of Drs. Repsher and Baker, on the issue of legal pneumoconiosis. Decision and Order at 6.

⁹ Employer's argument is, instead, relevant to disability causation at 20 C.F.R. §718.204(c).

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established total disability at Section 718.204(b)(2)(iv). Specifically, employer contends that a finding of total disability cannot be based on opinions attributing disability to the combined effects of heart disease and respiratory impairment. Further, employer contends that a finding of total disability cannot be made at Section 718.204(b) without determining the functional demands of claimant's usual coal mine employment and considering the evidence, in light of those demands. Employer argues that because no physician opined that claimant was unable to perform his usual coal mine employment, total disability cannot be established.

Contrary to employer's assertion, however, the administrative law judge noted that Dr. Simpao properly identified claimant's usual coal mine employment as that of a continuous miner operator, which required walking two miles per shift while bending over, and lifting one hundred pounds unassisted. The administrative law judge also noted that Dr. Simpao opined that claimant's impairment would prevent him from performing this work. Director's Exhibit 15. The administrative law judge noted that Dr. Baker also correctly identified claimant's last coal mine employment, and assessed claimant's impairment as "severe." Claimant's Exhibit 1. This evidence is sufficient to support the administrative law judge's finding of total disability at Section 718.204(b)(2)(iv). Further, we note that, contrary to employer's arguments, the administrative law judge properly considered all the evidence relevant to total disability at Section 718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge's findings of total disability at Section 718.204(b)(2)(ii) and (iv) are affirmed.

Finally, employer contends that the administrative law judge erred in finding disability causation established at Section 718.204(c). Employer contends that the administrative law judge's erroneous finding of legal pneumoconiosis tainted his finding of disability causation and that there was no evidence that claimant's clinical pneumoconiosis is totally disabling.

Citing the standard set forth at Section 718.204(c),¹⁰ the administrative law judge

¹⁰ Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §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

noted that he could not credit any opinion Dr. Repsher had on etiology because Dr. Repsher failed to find total respiratory disability, despite claimant's qualifying blood gas studies, and because he failed to find legal pneumoconiosis established. Instead, the administrative law judge credited the opinion of Dr. Baker, who found that both smoking and coal mine employment substantially contributed to claimant's disability because there was no way to distinguish between them in terms of causation.

As employer contends, because the administrative law judge's disability causation finding and legal pneumoconiosis finding are inextricably linked, we must vacate the administrative law judge's disability causation finding at Section 718.204(c) and remand the case for further consideration of this issue in light of the foregoing discussion. On remand, the administrative law judge must consider all of the relevant evidence on disability causation, including Dr. Repsher's opinion that claimant's blood gas study results were caused by smoking-related heart disease, rather than coal mine dust exposure.¹¹ We note, however, that Dr. Baker's inability to distinguish between smoking-related heart disease and coal dust exposure as causes of claimant's COPD does not preclude the administrative law judge from determining that his opinion establishes disability causation. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Additionally, we note that since the existence of clinical pneumoconiosis was stipulated to, the administrative law judge must consider whether the evidence establishes that claimant's disability is due to clinical pneumoconiosis.¹² *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

(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)(i), (ii).

¹¹ The administrative law judge noted that Dr. Baker explained at length that the testing results were consistent with a lung disorder, because they showed that the lungs could not sufficiently oxygenate the blood. Decision and Order at 8.

¹² The administrative law judge noted that Drs. Simpao, Baker, and Repsher all found the existence of clinical pneumoconiosis. Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge