

BRB No. 09-0542 BLA

VIVIAN ALLISON, on behalf of)
JAMES LEE ALLISON (Deceased Miner))
)
Claimant-Respondent)
)
v.)
)
ELK RUN COAL COMPANY) DATE ISSUED: 04/28/2010
)
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2005-BLA-5775) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-

¹ The miner previously filed a claim on April 14, 1999. Director's Exhibit 1. In a Decision and Order dated January 25, 2002, Administrative Law Judge Richard A. Morgan found that the miner established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), but denied benefits because the evidence was insufficient to establish that his disability was due to

944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² This case is before the Board for a second time. In her prior Decision and Order issued on May 1, 2007, the administrative law judge credited the miner with 28.21 years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish that the miner's disabling respiratory impairment was due to pneumoconiosis under 20 C.F.R. §718.204(c), and that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the subsequent claim on the merits, the administrative law judge further found that claimant established that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits, commencing May 14, 2004.

Employer appealed, and the Board vacated the award of benefits. The Board specifically agreed with employer that the administrative law judge erred in failing to explain the weight accorded the conflicting medical opinions as to whether the miner's disabling respiratory impairment was due to coal dust exposure pursuant to 20 C.F.R. §718.204(c).³ *See J.A. [Allison] v. Elk Run Coal Company*, BRB No. 07-0838 BLA, slip op. at 5-10 (July 24, 2008) (unpub.). Thus, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c) and 725.309, and remanded the case for further consideration.

In her Decision and Order on Remand issued on March 12, 2009, the administrative law judge rejected the opinions of Drs. Dahhan and Castle, that the miner's respiratory impairment was due entirely to smoking, and credited, as reasoned

pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* The miner appealed and the Board affirmed the denial of benefits on October 30, 2002. *Id.* The miner took no action with regard to the denial of his initial claim. He filed a subsequent claim on May 14, 2004, but later died on October 12, 2006. Director's Exhibit 2; Claimant's Exhibit 7. The miner's subsequent claim is being pursued by his surviving spouse.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the miner's initial and subsequent claims were filed before January 1, 2005. Director's Exhibits 1, 3.

³ The Board affirmed the administrative law judge's finding that the miner had 28.21 years of coal mine employment. *See J.A. [Allison] v. Elk Run Coal Company*, BRB No. 07-0838 BLA, slip op. at 2 n.4 (July 24, 2008) (unpub.).

and documented, the opinion of Dr. Gaziano, that the miner was totally disabled due, in part, to pneumoconiosis. Thus, the administrative law judge found that claimant established disability causation and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Considering the record as a whole on the merits, the administrative law judge found that claimant established that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge repeated her errors in weighing the opinions of Drs. Dahhan and Castle. Employer maintains that Dr. Gaziano's opinion is legally insufficient to satisfy claimant's burden of proving disability causation, and that the administrative law judge did not explain the basis for her finding that Dr. Gaziano's opinion was reasoned and documented. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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); see *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(d)(2). In this case, the miner's prior claim was denied because the evidence was insufficient to establish the element of disability causation.⁵ Director's

⁴ This case arises within the jurisdiction of the United States Court of Appeals for 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 Exhibit 4.

⁵ In order to establish entitlement to benefits in the miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must prove that that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. See 20

Exhibit 1. Therefore, claimant was required to submit new evidence to establish that the miner was totally disabled due to pneumoconiosis in order to have the miner's subsequent claim reviewed on the merits. *See White*, 23 BLR at 1-3.

In weighing, on remand, the conflicting opinions of Drs. Dahhan, Castle and Gaziano pursuant to 20 C.F.R. §718.204(c), the administrative law judge noted that each physician was Board-certified in internal medical and pulmonary medicine, and was considered to be equally qualified.⁶ Decision and Order at 7. The administrative law judge, however, accorded less weight to the opinions of Drs. Dahhan and Castle, because she found that they did not adequately explain why the miner's respiratory disability was due entirely to smoking. In contrast, she found that Dr. Gaziano provided a reasoned and documented opinion to establish that the miner was totally disabled due to both his history of smoking and coal dust exposure.

Employer challenges the administrative law judge's credibility determinations, asserting that she did not follow the Board's remand instructions. We disagree. Upon consideration of the administrative law judge's Decision and Order on Remand, the arguments on appeal and the evidence of record, we affirm the administrative law judge's findings at 20 C.F.R. §718.204(c), as they are rational and supported by substantial evidence.

Employer's arguments on appeal amount to little more than a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The Board remanded this case for the administrative law judge to reconsider Dr. Dahhan's statement that the miner's respiratory impairment was of a severity that is only rarely caused by coal dust exposure. The Board held that the administrative law judge mischaracterized Dr. Dahhan's opinion with regard to the significance of the reversibility of the pulmonary function study evidence noting, contrary to the administrative law judge's finding, that "Dr. Dahhan did not base his conclusion that claimant's total disability was not attributable to coal dust exposure on the fact that his pulmonary condition was *completely reversible*." *Allison*, BRB No. 07-0838 BLA, slip

C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

⁶ We incorporate by reference the summary of the medical opinions set forth in the Board's prior decision. *See Allison*, BRB No. 07-0838 BLA, slip op. at 4 n.6.

op. at 5 (emphasis added). The Board also instructed the administrative law judge to reconsider Dr. Dahhan's opinion that, because the miner's respiratory condition showed improvement during his examination, it was not consistent with respiratory impairment caused by pneumoconiosis.

The administrative law judge followed the Board's remand instructions and explained that she gave less weight to Dr. Dahhan's opinion because he "did not offer any support for his statement that pneumoconiosis rarely causes severe respiratory impairment . . . [when] the courts [and the Department of Labor] have consistently recognized that pneumoconiosis can in fact result in severe respiratory impairment." Decision and Order on Remand at 4; see Director's Exhibit 16. The administrative law judge also found that it was "disingenuous" for Dr. Dahhan to rely on waxing and waning in the test results between the time of Dr. Gaziano's June 17, 2004 examination and his own examination on November 20, 2004, without addressing "whether the administration of oxygen to a person undergoing a test to measure the oxygen level in his blood would affect the results." *Id.* at 4-5. Thus, the administrative law judge found Dr. Dahhan's opinion to be less reliable because he "based his conclusions on the results of tests conducted under different conditions" than those of Dr. Gaziano's examination. *Id.* at 5. The administrative law judge further noted that while Dr. Dahhan did not base his conclusion that claimant's total disability was not attributable to coal dust exposure on the fact that his pulmonary condition was completely reversible, Dr. Dahhan "did not address the question of whether the significantly non-reversible portion of [the miner's] pulmonary function studies were consistent with disability due to coal dust exposure." Decision and Order on Remand at 5; see *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. May 11, 2004) (unpub.).

With regard to Dr. Castle, the Board directed the administrative law judge to reconsider Dr. Castle's opinion that claimant did not have any physical findings to indicate the presence of an interstitial pulmonary process consistent with pneumoconiosis. The Board also instructed the administrative law judge to further address Dr. Castle's discussion of respiratory acidosis and his statement "that when coal workers' pneumoconiosis causes an impairment, it generally does so by causing a mixed irreversible obstructive and restrictive impairment." *Allison*, BRB No. 07-0838 BLA at 9 n.12, quoting Employer's Exhibit 2 at 12.

On remand, the administrative law judge found that Dr. Castle's opinion was less persuasive as he did not address all of the relevant evidence of record, including the CT scan evidence showing extensive interstitial disease or "findings of fibrosis on the November 20, 2004 x-ray." Decision and Order on Remand at 5-6. The administrative law judge explained that Dr. Castle's opinion was entitled to less weight because Dr. Castle excluded coal dust exposure as a causative factor in the miner's respiratory impairment based, in part, on the fact that the miner's condition was purely obstructive.

As noted by the administrative law judge, however, the regulations recognize that pneumoconiosis may consist of an entirely obstructive respiratory condition pursuant to 20 C.F.R. §718.201. *See Swiger*, 98 Fed. Appx. at 237; *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, Case No. 08-1232 (4th Cir. Apr. 5, 2004) (unpub.). The administrative law judge also found that Dr. Castle failed to reconcile his statement that respiratory acidosis is “typical of someone with severe airway obstruction due to tobacco smoking” and is “not the expected finding that you would have with coal workers’ pneumoconiosis,” with his own diagnosis of coal workers’ pneumoconiosis in this case. Employer’s Exhibit 2; *see* Decision and Order on Remand at 6.

Because the administrative law judge has broad discretion in assessing the credibility of the medical experts and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, we affirm the administrative law judge’s credibility determinations with regard to Drs. Dahhan and Castle, as they were within her discretion as the trier of fact. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Anderson*, 12 BLR at 1-112. Thus, we affirm the administrative law judge’s decision to give less weight to the opinions of Drs. Dahhan and Castle pursuant to 20 C.F.R. §718.204(c).

Furthermore, we reject employer’s assertion that the administrative law judge erred in failing to explain, in accordance with the Administrative Procedure Act (APA), the basis for her decision to credit Dr. Gaziano’s opinion at 20 C.F.R. §718.204(c). *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The administrative law judge found that Dr. Gaziano’s opinion, that the miner’s total disability was due, in part, to pneumoconiosis, was reasoned and documented because it was based on “objective testing, as well as his clinical findings on examination of [the miner], and [the miner’s] history and symptoms.” Decision and Order on Remand at 7. Because the administrative law judge explained her findings in accordance with the APA, we affirm her finding that Dr. Gaziano’s opinion was sufficient to establish that the miner was totally disabled due, in part, to pneumoconiosis at 20 C.F.R. §718.204(c). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Clark*, 12 BLR at 1-151. We therefore affirm, as supported by substantial evidence, the administrative law judge’s finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.309, and

entitlement to benefits in the miner's claim.⁷ *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁷ We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).