

U.S. Department of Labor

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



BRB No. 15-0305 BLA

BOBBY R. COLEMAN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PARIS MEADOWS COAL COMPANY)	DATE ISSUED: 04/28/2016
)	
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 of Kenneth A. Krantz,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds),
Norton, Virginia, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2011-BLA-05059) of
Administrative Law Judge Kenneth A. Krantz, rendered on a claim filed on September
15, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In his initial Decision and Order issued on March 12, 2013, the administrative law judge credited claimant with 8.73 years of coal mine employment,¹ and found that claimant established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that his pneumoconiosis arose from his coal mine employment under 20 C.F.R. §718.203, and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

Employer appealed, raising procedural and evidentiary challenges to the administrative law judge's award of benefits. The Board initially rejected employer's argument that the administrative law judge erred in excluding digital x-ray interpretations from the record and in admitting Dr. Forehand's pulmonary evaluation of claimant as a treatment note. *See Coleman v. Paris Meadows Coal Co.*, BRB No. 13-0302 BLA, slip op. at 3-4 (Apr. 29, 2014) (unpub). However, the Board agreed with employer that the administrative law judge erred in denying employer's request to allow Dr. Fino to review and respond to Dr. Forehand's treatment records. *Id.* at 4-5. To the extent that the evidentiary record was incomplete, and because the Board agreed with employer that the administrative law judge did not consider all the relevant evidence and committed several errors in weighing the medical opinion evidence,² the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203, and 718.204(c).³ *Id.* at 5-7. Thus, the Board vacated the administrative law judge's award of benefits and

¹ Because claimant failed to establish at least fifteen years of coal mine employment, the administrative law judge found that claimant was not eligible to invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

² The Board held that the administrative law judge erred in finding that Dr. Al-Khasawneh did not rely upon an exaggerated coal mine employment history in rendering his opinion; failed to explain why Dr. Gallai's reliance on a reduced smoking history of 35 years did not affect the credibility of his opinion; did not address whether Dr. Hinson's reliance on a coal mine employment history of twelve years affected the credibility of his opinion; and erred in relying on Dr. Forehand's diagnosis of obstructive lung disease to support a finding of legal pneumoconiosis, as the doctor did not relate the disease to coal dust exposure. *See Coleman v. Paris Meadows Coal Co.*, BRB No. 13-0302 BLA, slip op. at 7 (Apr. 29, 2014).

³ The Board affirmed, as unchallenged, the administrative law judge's finding that claimant established 8.73 years of coal mine employment and total disability pursuant to 20 C.F.R. §718.204(b). *See Coleman*, BRB No. 13-0302 BLA, slip op. at 3 n. 3.

instructed him on remand to apply the same level of scrutiny to all of the medical opinions and to thoroughly explain the bases for his credibility determinations in accordance with the Administrative Procedure Act (APA).⁴ *Id.*

On remand, the administrative law judge reopened the record for admission of Dr. Fino's supplemental report. In his Decision and Order on Remand issued on April 30, 2015, the administrative law judge reconsidered the evidence of record, including Dr. Fino's supplemental report, and again awarded benefits.

On appeal, employer argues that the administrative law judge failed to properly consider claimant's treatment records, and erred in finding that claimant established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer also contends that the administrative law judge erred in finding that claimant's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203, and erred in finding that claimant's disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board. Employer has filed a reply brief, reiterating its arguments.

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.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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements

⁴ The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

⁵ Because claimant's last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 20.

precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. LEGAL PNEUMOCONIOSIS

The administrative law judge reconsidered the medical opinion evidence on remand, summarizing each physician's opinion relevant to the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). The administrative law judge noted that Dr. Gallai diagnosed severe obstructive lung disease and chronic bronchitis, indicating that it was "difficult to apportion the amount secondary to [claimant's] cigarette smoking history or his coal dust exposure." Decision and Order on Remand at 35, *quoting* Claimant's Exhibit 2. In accordance with the Board's instructions, the administrative law judge reconsidered the weight to accord Dr. Gallai's opinion, given the physician's understanding of claimant's work and smoking histories. *Id.* The administrative law judge concluded that Dr. Gallai's opinion was entitled to "great probative weight" on the issue of legal pneumoconiosis. *Id.*

With regard to Dr. Al-Khasawneh, the administrative law judge observed that he provided two reports in 2009 and 2010, diagnosing legal pneumoconiosis. *See* Decision and Order on Remand at 35-36; Director's Exhibits 12, 15. The administrative law judge found that the first diagnosis of legal pneumoconiosis was equivocal and that Dr. Al-Khasawneh provided "no reason why [he stated that] 'all these years of coal mine employment' are related to [c]laimant's respiratory conditions."⁶ Decision and Order on Remand at 36, *quoting* Director's Exhibit 12. The administrative law judge further found that "Dr. Al-Khasawneh's second opinion bases his finding of legal pneumoconiosis on his finding of clinical pneumoconiosis, which in turn is based on the x-ray he reviewed." Decision and Order on Remand at 36. The administrative law judge also noted that Dr. Al-Khasawneh reported an accurate smoking history of between 46 and 48 years, "consistent with my own finding." *Id.* The administrative law judge concluded that Dr. Al-Khasawneh's opinion was entitled to "slight probative weight" in considering whether claimant established the existence of legal pneumoconiosis. *Id.*

The administrative law judge next discussed Dr. Fino's opinion, observing that Dr. Fino found insufficient evidence to justify a diagnosis of legal pneumoconiosis, but

⁶ The administrative law judge stated that "[w]hile Dr. Al-Khasawneh did not overstate [c]laimant's coal mine history, and understood that [c]laimant's coal mine employment ended in 1986, I agree with the Board's note that Dr. Al-Khasawneh never explicitly stated the length of coal mine employment history." Decision and Order on Remand at 36.

attributed claimant's disabling obstructive respiratory impairment entirely to emphysema caused by smoking and asthma, unrelated to coal dust exposure. Decision and Order on Remand at 36; *see* Director's Exhibit 18; Employer's Exhibits 4, 6. The administrative law judge concluded that Dr. Fino's opinion was not sufficiently explained and was entitled to "little probative value." Decision and Order on Remand at 36-37. Weighing all of the evidence together, the administrative law judge found that claimant established the existence of legal pneumoconiosis because "Dr. Gallai's opinion, bolstered slightly by Dr. Al-Khasawneh's opinion, is entitled to more weight than Dr. Fino's [opinion]." *Id.* at 37.

Employer contends that, in weighing Dr. Fino's opinion, the administrative law judge improperly imposed the burden of proof on employer to establish that claimant's lung condition was not related to his coal dust exposure. Specifically, employer points out the administrative law judge's determination that Dr. Fino "offered multiple conditions from which claimant might be suffering including possible sarcoidosis, possible asthma and emphysema" but "failed to explain why none of [claimant's respiratory conditions] was possibly caused in part by coal dust exposure in [c]laimant's coal mine employment." Decision and Order on Remand at 36. Employer asserts that this statement indicates that the administrative law judge "applied a de facto presumption that [c]laimant's condition arose out of coal mine employment and improperly shifted the burden of rebuttal employer." Employer's Brief in Support of Petition for Review at 19.

Contrary to employer's contention, the administrative law judge specifically recognized that claimant bears the burden of proving the existence of legal pneumoconiosis. Decision and Order on Remand at 4, 5, 37, 41. We do not consider the administrative law judge's statement to be an improper shifting of the burden of proof. Rather, the administrative law judge simply found that Dr. Fino's opinion, that coal dust exposure did not contribute in any way to claimant's respiratory disease, was not sufficiently reasoned to outweigh claimant's evidence. Decision and Order on Remand at 36-37. Although claimant bears the burden of proving, by a preponderance of the evidence, that he has pneumoconiosis, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), when there is conflicting evidence, the administrative law judge must determine the weight to which each item of evidence is entitled. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As explained *infra*, the administrative law judge properly explained the bases for his

⁷ The administrative law judge reconsidered Dr. Hinson's opinion, set forth in claimant's treatment records, wherein Dr. Hinson diagnosed legal pneumoconiosis. Decision and Order on Remand at 37; *see* Employer's Exhibit 1. The administrative law judge found Dr. Hinson's opinion to be "conclusory" and insufficiently explained. *Id.*

credibility determinations with regard to Dr. Fino, and we reject employer's assertion that the administrative law judge improperly shifted the burden of proof to employer to disprove that claimant has legal pneumoconiosis. Decision and Order on Remand at 37.

In considering Dr. Fino's opinion on remand, the administrative law judge noted correctly that Dr. Fino opined that claimant does not have legal pneumoconiosis based on "studies relating rates of emphysema and [chronic obstructive pulmonary disease (COPD)] to years in coal mine employment in miners[,] and extrapolat[ed] from those figures whether or not [claimant's] lung function decline was related to coal dust exposure." Decision and Order on Remand at 36-37; *see* Director's Exhibit 18; Employer's Exhibits 4, 6. The administrative law judge permissibly found Dr. Fino's reliance on "statistical probabilities" to be unpersuasive. Decision and Order on Remand at 37; *see Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013) (holding that an administrative law judge may reject an opinion that relies on general statistics); *see also Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Additionally, the administrative law judge acted within his discretion in finding that Dr. Fino did not adequately explain why claimant's respiratory or pulmonary impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order on Remand at 36; *see* 20 C.F.R. §718.201(a)(2); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Employer also argues that the administrative law judge failed to explain his reasons for crediting Dr. Gallai's diagnosis of legal pneumoconiosis, as required by the APA and the Board's instructions. We disagree. The administrative law judge summarized accurately the entirety of Dr. Gallai's August 16, 2011 medical report, including Dr. Gallai's explanation for why claimant has legal pneumoconiosis. Decision and Order on Remand at 11-12. As the administrative law judge noted, Dr. Gallai specifically stated in his report:

[T]he rapidity of [claimant's] symptoms happening 4 1/2 years ago and the dramatic decrease in his pulmonary function over 17 months to me indicates that this dramatic change in such a short time would be more consistent with his coal dust exposure rather than his obstructive lung disease principally from cigarette smoking. Obstructive lung disease principally from cigarette smoking does deteriorate more rapidly than [sic] nonsmokers, but at a more consistent steady rate rather than [sic] a spurt with such a rapid deterioration [sic].

Claimant's Exhibit 2 at 4; Decision and Order on Remand at 12. The administrative law judge explained⁸ that he credited Dr. Gallai's opinion because Dr. Gallai indicated that claimant's "progression of disease was 'more consistent' with coal dust exposure than cigarette smoking."⁹ Decision and Order on Remand at 35, *quoting* Claimant's Exhibit 2.

Furthermore, in accordance with the Board's instruction, the administrative law judge took into consideration whether Dr. Gallai had an accurate understanding of claimant's work and smoking histories when diagnosing legal pneumoconiosis. The administrative law judge found that Dr. Gallai properly credited claimant with 8.5 years of coal mine employment and relied on a smoking history of 35 pack years, in contrast with the administrative law judge's finding of 48.3 pack years. Decision and Order on Remand at 35. We conclude that the administrative law judge acted within his discretion in finding that while "Dr. Gallai moderately underestimated [claimant's] smoking history," his opinion is "only slightly undermined by his underestimation of pack years" because he understood that claimant's "smoking history was significantly longer than his coal mine employment history, and Dr. Gallai knew [c]laimant continued to smoke for many years after he left coal mining." Decision and Order on Remand at 35; *Looney*, 678 F.3d at 311 n. 2, 25 BLR at 2-124 n. 2.

Because the administrative law judge explained the weight he accorded the evidence, his Decision and Order on Remand satisfies the APA. *See Looney*, 678 F.3d at 316, 25 BLR at 2-133 (explaining that if a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation under the APA is satisfied). Additionally, as the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir.

⁸ This finding is consistent with the administrative law judge's prior finding that "[b]y highlighting differences in rate of deterioration, Dr. Gallai properly supported his conclusion that [c]laimant's obstructive disease stemmed from coal dust exposure." 2013 Decision and Order at 36.

⁹ Contrary to employer's contention, Dr. Gallai was not required to apportion the relative contributions of smoking and coal dust exposure to claimant's chronic obstructive pulmonary impairment in order for the administrative law judge to find his opinion credible. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

1999); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cr. 1997). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, based on Dr. Gallai's opinion at 20 C.F.R. §718.202(a)(4),¹⁰ and in consideration of the evidence as a whole under 20 C.F.R. §718.202(a).¹¹ *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

II. DISABILITY CAUSATION

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge determined that Dr. Fino's opinion was entitled to little weight on the issue of disability causation. Contrary to employer's argument, the administrative law judge permissibly found Dr. Fino's opinion to be less credible on the cause of claimant's respiratory disability, as Dr. Fino failed to diagnose legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order on Remand at 40-41. We also see no error in the administrative law judge's finding that Dr. Fino did not adequately explain the basis for his "conclusory" statement that, even assuming that claimant had pneumoconiosis, claimant "would be as disabled had he never stepped foot in the mines." Decision and Order on Remand at 40, *quoting* Director's Exhibit 18 at 15; Employer's Exhibit 4 at 18; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21.

In contrast, the administrative law judge reiterated that Dr. Gallai adequately explained why "the pattern of progression of symptoms" indicated that claimant's respiratory disability was due to pneumoconiosis. Decision and Order on Remand at 40;

¹⁰ Employer argues that the administrative law judge should have assigned Dr. Al-Khasawneh's opinion no weight as opposed to "slight probative weight." Decision and Order on Remand at 36. We consider the error, if any, by the administrative law judge in crediting Dr. Al-Khasawneh's opinion to be harmless, as Dr. Gallai's opinion, standing alone, constitutes substantial evidence to support the administrative law judge's finding of legal pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984)

¹¹ Contrary to employer's argument, the administrative law judge observed correctly that a finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) subsumes a finding that the legal pneumoconiosis arose out of coal mine employment, as required under 20 C.F.R. §718.203.

Claimant's Exhibit 2. For the reasons he discussed with respect to the issue of legal pneumoconiosis, we reject employer's assertion that the administrative law judge erred in explaining the weight accorded Dr. Gallai's opinion under the APA, and that the administrative law judge abused his discretion in finding that Dr. Gallai's opinion was well-reasoned.¹² Decision and Order on Remand at 41; *Mays*, 176 F.3d at 762 n.10, 21

¹² We reject employer's argument that the administrative law judge did not give proper consideration to the treatment records, as the administrative law judge fully summarized that evidence and permissibly found that "the hospitalization and treatment records are of little probative value regarding the presence of legal pneumoconiosis: neither proving nor disproving its existence." Decision and Order on Remand at 18-27, 37; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

BLR at 2-603 n.10. Therefore, we affirm the administrative law judge's reliance on Dr. Gallai's opinion to find that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c), and we affirm the award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge