



BRB No. 16-0341 BLA

ALLEN B. DOMETROVICH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WY POCAHONTAS LAND COMPANY,)	DATE ISSUED: 04/19/2017
f/k/a Y & O COAL)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Henry C. Bowen (Pullin, Fowler, Flanagan, Brown & Poe, PLLC), Charleston, West Virginia, for employer.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-5255) of Administrative Law Judge Steven D. Bell, rendered on a claim filed on March 14, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulations that claimant worked for 10.5 years¹ in coal mine employment² and suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found that claimant established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4).³ The administrative law judge, however, found that claimant failed to establish that his total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant asserts that the denial of benefits should be reversed and benefits awarded, or, alternatively, that the case should be remanded for reconsideration of the disability causation issue. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response in this

¹ Because claimant established less than fifteen years of coal mine employment, claimant is not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; Hearing Transcript at 11.

³ The administrative law judge found that claimant also established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 because a finding of legal pneumoconiosis subsumes the issue of whether the disease arose out of coal mine employment. Decision and Order at 17; *see Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

appeal. However, in a footnote to his letter to the Board, the Director agrees with claimant that the administrative law judge erred in his analysis of Dr. Go's disability causation opinion pursuant to 20 C.F.R. §718.204(c).⁴

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. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is caused by pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant argues that the administrative law judge erred in failing to apply the proper standard for disability causation and erred in weighing the medical opinion evidence at 20 C.F.R. §718.204(c). Claimant's arguments have merit.

Before addressing the disability causation issue raised by claimant, we will first summarize the administrative law judge's finding that claimant established legal pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the opinions of Drs. Go, Saludes, and Fino. Dr. Go diagnosed smoking-related⁵ COPD, in the form of emphysema and chronic bronchitis, but opined that claimant suffers from legal pneumoconiosis, because coal mine dust exposure was a contributing factor to claimant's COPD. Claimant's Exhibit 1. Dr. Saludes diagnosed "significant" COPD, which he attributed to claimant's longstanding cigarette smoking history. Director's Exhibit 8 at 8. However, he also opined that claimant suffers from legal pneumoconiosis because the inhalation of coal mine dust was a contributing factor to

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 10.5 years of coal mine employment and that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ The administrative law judge found that the record establishes a cigarette smoking history of "at least 100 pack-years." Decision and Order at 13. As claimant does not challenge that finding, it is affirmed. See *Skrack*, 6 BLR at 1-711.

claimant's COPD. *Id.* Dr. Fino diagnosed "very severe" COPD with emphysema, but stated that this impairment is unrelated to coal mine dust exposure and is due solely to claimant's history of cigarette smoking. Employer's Exhibits 3, 6. The administrative law judge found that the opinions of Drs. Go and Saludes were reasoned and documented, whereas Dr. Fino's opinion was not persuasive because of defects in his reasoning and explanation. Decision and Order at 13-17. The administrative law judge therefore found that claimant established that his COPD constitutes legal pneumoconiosis.⁶ *Id.*

Prior to evaluating the medical opinions at 20 C.F.R. §718.204(c), the administrative law judge, citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014), articulated the proper standard under the regulations for establishing disability causation, i.e., claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and Order at 17-19. 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
- (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); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-228, 2-303 (6th Cir. 2001).

However, the administrative law judge applied an erroneous standard in his analysis of whether the medical opinion evidence met claimant's burden on this issue. Instead of focusing on the contribution that legal pneumoconiosis makes to claimant's total respiratory disability at 20 C.F.R. §718.204(c)(1), the administrative law judge revisited the question of the extent to which claimant's respiratory impairment is attributable to coal mine dust exposure, which is the relevant inquiry in establishing the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4). Decision and Order at 20-22. Specifically, the administrative law judge set forth the following requirement for claimant to establish disability causation:

⁶ Employer has not disputed the administrative law judge's finding that claimant's chronic obstructive pulmonary disease is legal pneumoconiosis. *See Skrack*, 7 BLR at 1-711.

Especially in cases like [claimant's], in which his smoking history is ten-times that of his [coal mine dust] exposure history, substantial or coequal contribution from each injurious exposure cannot be presumed. To the contrary, a persuasive rationale must be articulated for why one-tenth of [claimant's] injurious exposure constitutes a substantial or material component of his disability, even considering the [Department of Labor's] recognition that dust-[induced] and smoke-induced emphysema occur through similar mechanisms and that they occur at roughly the same incidence.

Decision and Order at 18. The administrative law judge found that the opinions of Drs. Go and Saludes failed to meet this standard. This was error. Having determined that legal pneumoconiosis was established, in the form of claimant's COPD, the administrative law judge should have considered whether that condition is a "substantially contributing cause" of claimant's disabling respiratory or pulmonary impairment.⁷ 20 C.F.R. §718.204(c)(1); *see Groves*, 761 F.3d at 599, 25 BLR at 2-624; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 490, 25 BLR 2-135, 2-154-55 (6th Cir. 2012); *Kirk*, 264 F.3d at 611, 22 BLR at 2-303; 20 C.F.R. §718.204(c)(1).

Notwithstanding the administrative law judge's error in the application of an incorrect legal standard, the facts of this case do not mandate a remand for application of the correct standard. While factual determinations are the province of the administrative law judge, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014) (reversing denial, with directions to award benefits without further administrative proceedings); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989) (same).

The findings essential to our consideration have been rendered by the administrative law judge in this case. The record reflects that Drs. Go, Saludes, and Fino agree that claimant is totally disabled by COPD. Director's Exhibit 8; Claimant's Exhibit 1; Employer's Exhibits 3, 6. As the administrative law judge noted, the doctors "agreed that [claimant's] extensive and longstanding smoking history was the primary cause of

⁷ In *Groves*, the Sixth Circuit held that the administrative law judge erred in stating that the miner need only establish that legal pneumoconiosis was a contributing cause of the miner's totally disabling respiratory or pulmonary impairment, when the regulatory standard requires that pneumoconiosis be a substantially contributing cause. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599, 25 BLR 2-615, 2-624 (6th Cir. 2014).

his disabling obstruction,” but disagreed as to whether claimant’s 10.5 years of coal mine dust exposure also played a role in the development of the disabling obstruction. As discussed *supra*, the administrative law judge credited the opinions of Drs. Go and Saludes over that of Dr. Fino as establishing that claimant’s COPD was significantly related to, or substantially aggravated by, claimant’s coal mine dust exposure. Decision and Order at 18.

In sum, there is no dispute between Drs. Go, Saludes, and Fino that claimant’s totally disabling respiratory impairment is due to COPD, and the administrative law judge found that claimant’s COPD is legal pneumoconiosis. As the record reveals no other condition that could have caused claimant’s disabling respiratory impairment other than his COPD, and the administrative law judge found that claimant’s disabling COPD is legal pneumoconiosis, the opinions of Drs. Go and Saludes establish disability causation at 20 C.F.R. §718.204(c). See *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847, 25 BLR 2-799, 2-816-18 (6th Cir. 2016); *Groves*, 761 F.3d at 599, 25 BLR at 2-624; *Kirk*, 264 F.3d at 611, 22 BLR at 2-303; *Adams*, 886 F.2d at 826, 13 BLR at 2-63-64. Consequently, we agree with claimant that the facts of this case warrant reversal of the administrative law judge’s denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and reversed in part, and this case is remanded for entry of an award of benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge