

BRB No. 08-0785 BLA

P.C.)
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 Claimant-Respondent)
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 v.)
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 OTR, INCORPORATED) DATE ISSUED: 08/28/2009
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 and)
)
 WAUSAU INSURANCE COMPANIES)
)
 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 Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Sidney B. Douglas, Harlan, Kentucky, for claimant.

W. Barry Lewis (Lewis and Lewis Law Office), Hazard, Kentucky, for
employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (07-BLA-5912) of
Administrative Law Judge Janice K. Bullard rendered on a miner's claim filed 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). The administrative law judge accepted the
parties' stipulation to twenty-four and one-quarter years of qualifying coal mine

employment, as supported by the record, and adjudicated this claim, filed on August 1, 2006, pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence of record was sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), and disability causation under Section 718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.¹

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.² 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).

Employer contends that the administrative law judge improperly evaluated the medical opinions of record, shifted the burden of proof to employer, and failed to provide valid reasons for her credibility determinations, as required by the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated in to the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d), and 5 U.S.C. §554(c)(2). Specifically, employer asserts that Dr. Alam's opinion is neither well-reasoned nor sufficient to support the administrative law judge's findings of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c), and that the administrative law judge should have credited the contrary opinions of the better qualified physicians, Drs. Broudy and Dahhan.

¹ The administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because the miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3 at 1.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. At Section 718.202(a)(4), the administrative law judge accurately summarized the conflicting medical opinions of record, and determined that Dr. Alam, whose qualifications were not contained in the record, diagnosed legal pneumoconiosis, *i.e.*, chronic bronchitis, emphysema and dyspnea due to a combination of coal mine dust exposure and tobacco abuse. Decision and Order at 7-8; Director's Exhibits 10, 12. Dr. Alam concluded that claimant was totally disabled from a pulmonary standpoint, and that at least twenty to thirty percent of his impairment was related to coal dust exposure. *Id.* By contrast, Dr. Broudy, a B reader who is Board-certified in internal medicine and pulmonary disease, found no evidence of clinical or legal pneumoconiosis, and attributed claimant's totally disabling respiratory impairment to chronic obstructive airways disease caused by smoking and some "predisposition to asthma or bronchospasm." Decision and Order at 8; Director's Exhibits 14, 17 at 12-15. Similarly, Dr. Dahhan, a B reader who is also Board-certified in internal medicine and pulmonary disease, found no evidence of clinical pneumoconiosis, and opined that claimant suffered a moderate, partially reversible obstructive ventilatory impairment due to smoking. Decision and Order at 9; Employer's Exhibit 1 at 2.

In evaluating the conflicting medical opinions, the administrative law judge acted within her discretion in finding that Dr. Alam's diagnosis of legal pneumoconiosis was persuasive, whereas the reasoning of Drs. Broudy and Dahhan was flawed. Decision and Order at 10; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Employer's assertions that the administrative law judge failed to explain her factual determinations, and improperly substituted her own opinion for those of Drs. Broudy and Dahhan, are without merit. The administrative law judge determined that Drs. Broudy and Dahhan opined that claimant's obstructive defect could not be due to coal dust exposure based, in part, on the reversibility of his test results,³ yet they conceded that claimant's obstructive impairment was only partially reversible after bronchodilation, and, in fact, the post-bronchodilator testing produced qualifying values. Decision and Order at 10, 12. Additionally, the administrative law judge determined that, although Dr. Broudy stated that pneumoconiosis typically causes a restrictive defect, he conceded that

³ Dr. Broudy testified at deposition that "[c]oal workers' pneumoconiosis when it causes impairment does not result in a reversible obstructive defect." Director's Exhibit 17 at 10. Dr. Dahhan stated that claimant's obstructive ventilatory impairment "demonstrates significant response to the administration of bronchodilators, a finding that is inconsistent with the permanent adverse affects [sic] of coal dust on the respiratory system; it is associated with a loss of 800 cc of FEV₁, an amount that cannot be accounted for by the obstructive impact of coal dust on the respiratory system...." Employer's Exhibit 1 at 2.

it can cause a mixed defect and contribute to an obstructive airways condition. Decision and Order at 10; Director's Exhibit 17 at 14, 18. Because Drs. Broudy and Dahhan⁴ failed to address the possibility that some portion of claimant's residual obstructive impairment was due to coal dust exposure, the administrative law judge permissibly accorded less weight to their opinions. Decision and Order at 10; *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2004).

After considering the underlying documentation and rationale provided by Dr. Alam, the administrative law judge acted within her discretion in finding that his opinion was the best reasoned and was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Decision and Order at 7-8, 10. Contrary to employer's arguments, Dr. Alam's diagnoses of chronic bronchitis arising out of coal mine employment and emphysema aggravated by coal dust exposure satisfy the regulatory definition of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); Director's Exhibits 10, 12; *see Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). We also reject employer's contention that the administrative law judge was obligated to discount Dr. Alam's opinion on the grounds that he lacked pulmonary credentials⁵ and that his reports were "confusing" and contained multiple typographical errors. Employer's Brief at 8-9. The administrative law judge properly noted the respective qualifications of the physicians, and acknowledged that Dr. Alam's conclusions were not "perfectly stated," but permissibly found that Dr. Alam's diagnosis of legal pneumoconiosis was reasoned, persuasive and "supported by physical examination, employment and social history, and various testing." Decision and Order at 10; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

⁴ In addition, the administrative law judge rationally found that Dr. Dahhan's opinion, that claimant's bronchitis could not be attributable to coal dust exposure because claimant's coal mine employment ended in 1994, was inconsistent with the amended regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); Decision and Order at 10; *see generally Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *see also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987).

⁵ However, Dr. Alam's medical report reflects the subscript "Pulmonologist." *See* Director's Exhibits 10, 12 at 2.

An administrative law judge, as the trier of fact, is not compelled to accord greater weight to the opinions of physicians with superior qualifications, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), nor to accept any particular medical opinion, explanation or theory, but is bound to assess the persuasiveness and validity of the conflicting medical evidence. *See generally Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding of legal pneumoconiosis at Section 718.202(a)(4).

Lastly, employer contends that the administrative law judge erred in relying on the opinion of Dr. Alam to support her finding of disability causation at Section 718.204(c). Employer reiterates the arguments it raised on the issue of the existence of legal pneumoconiosis, and asserts that the administrative law judge provided no valid reasons for her credibility determinations. Employer's Brief at 16-25. Employer essentially seeks a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge correctly noted that a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see* Decision and Order at 13. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.⁶ 20 C.F.R. §718.204(c)(1); *see Gross*, 23 BLR at 1-17 (2004). The administrative law judge found that Dr. Alam provided the only reasoned opinion on this issue, and permissibly accorded no weight to the contrary opinions of Drs. Broudy and Dahhan because they did not diagnose legal pneumoconiosis, in direct contradiction to the administrative law judge's finding. Decision and Order at 14; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-372, 2-382-84 (4th Cir. 2002). As Dr. Alam indicated that at least twenty to thirty percent of claimant's disabling pulmonary impairment was due to coal dust exposure, Director's Exhibits 10, 12, the administrative law judge reasonably concluded that pneumoconiosis constituted more than a *de minimus* contribution to claimant's disability. Decision and Order at 14; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Because substantial evidence supports the administrative law judge's finding that Dr. Alam's opinion is sufficient to

⁶ The comments to the regulations clarify that the inclusion of the words "material" or "materially" reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. 79,946 (Dec. 20, 2000).

establish that pneumoconiosis was a substantially contributing cause of claimant's disabling lung impairment pursuant to Section 718.204(c), it is affirmed. Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order 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