

BRB Nos. 09-0648 BLA
and 10-0312 BLA

DORIS VANDALL)	
(o/b/o and Widow of AMOS VANDALL))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SEWELL COAL COMPANY)	DATE ISSUED: 08/20/2010
)	
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 Awarding Benefits on Remand and the Decision and Order Awarding Benefits on Remand of a Request for Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Keith P. Harmon (Washington and Lee University Legal Clinic), Lexington, Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2004-BLA-5580) and the Decision and Order Awarding Benefits on Remand of a Request for Modification (2004-BLA-0064) of Administrative Law Judge Alice M. Craft rendered on a survivor's claim and a miner's duplicate claim filed pursuant to the provisions of the Black Lung Benefits Act,¹ 30 U.S.C. §§901-944 (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 the second time. In her original decision in

¹ The Department of Labor previously amended the regulations implementing the Black Lung Benefits Act. These regulations, found at 20 C.F.R. Parts 718, 722, 725 and 726 (2009), became effective on January 19, 2001. All citations to the regulations, unless otherwise noted, refer to the amended regulations. The revised regulations at 20 C.F.R. §§725.309 and 725.310 do not apply to claims, such as the miner's claim herein, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

² The miner's first claim, filed on August 7, 1972, was finally denied because the miner failed to establish any element of entitlement. Director's Exhibits 70-1, 70-21. The miner's second claim, filed on December 2, 1985, was finally denied because the miner failed to establish a material change in conditions since the prior denial of benefits pursuant to 20 C.F.R. §725.309(d)(2000). Director's Exhibits 71-1, 71-54.

On July 22, 1992, the miner filed the instant claim. Director's Exhibit 4. While employer's stipulation to the presence of a totally disabling respiratory impairment established a material change in conditions since the prior denial of benefits pursuant to 20 C.F.R. §725.309(d)(2000), the claim was ultimately denied on the ground that the evidence was insufficient to establish the existence of pneumoconiosis or that the miner's total disability was due to pneumoconiosis. Director's Exhibit 62. The miner requested modification on July 6, 1998. Director's Exhibits 63, 67, 68, 72. In a decision dated August 7, 2000, the miner's claim was denied because the evidence was insufficient to establish either the existence of pneumoconiosis or that the miner's total disability was due to pneumoconiosis. Director's Exhibit 114.

On September 2, 2000, the miner filed an appeal with the Board. While the appeal was pending, the miner died on January 4, 2001. Director's Exhibits 117, 118. On February 28, 2001, claimant, the miner's widow, filed her claim for survivor's benefits, and on April 10, 2001, she requested modification of the denial of the miner's claim and submitted additional evidence. Director's Exhibits 107, 121, 131. The Board dismissed the miner's appeal and remanded the case to the district director for modification proceedings. Director's Exhibit 122. Both the miner's claim and the survivor's claim were denied by the district director, and were referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 152-153. Based on the dates of filing, Administrative Law Judge Alice M. Craft determined that different

the miner's claim, the administrative law judge credited the miner with at least twenty-five years of coal mine employment, and determined that employer had previously stipulated that the miner was totally disabled. The administrative law judge found that the evidence submitted in support of modification, considered in conjunction with the earlier evidence, was sufficient to establish clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge found that claimant, the miner's widow, had established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) since the previous claim was denied, and a mistake in a determination of fact sufficient to support modification of the denial of the miner's claim pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found that the weight of the evidence was sufficient to establish that the miner's legal pneumoconiosis was a substantially contributing cause of his disability pursuant to 20 C.F.R. §718.204(c) and, thus, she granted modification pursuant to 20 C.F.R. §725.310 (2000). Adjudicating the survivor's claim, the administrative law judge found that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both claims.

On appeal, the Board rejected employer's evidentiary arguments, but vacated the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §§718.202(a)(4), 718.205(a)(1), and remanded the case for further consideration and discussion of the relevant evidence of record in compliance with the provisions of the Administrative Procedure Act (APA), 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 Board also vacated the administrative law judge's findings of disability causation at Section 718.204(c) in the miner's claim and death due to pneumoconiosis at Section 718.205(c) in the survivor's claim, as these findings were largely dependent upon her finding of legal pneumoconiosis. Accordingly, the Board remanded the case for further consideration of the appropriate relevant evidence in both claims. *Vandall v. Sewell Coal Co.*, BRB Nos. 06-0943 BLA and 06-0893 BLA (Aug. 24, 2007)(unpub.).

On remand, the administrative law judge found that the weight of the evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), disability causation at Section 718.204(c), and death due to pneumoconiosis at Section 718.205(c). The administrative law judge concluded that claimant established a material change in conditions since the denial of the miner's previous claim pursuant to Section 725.309(d)(2000), and a mistake in a determination of

versions of the regulations governed the miner's claim and the survivor's claim. The administrative law judge held separate hearings and issued separate decisions for the two claims.

fact sufficient to support modification of the denial of the miner's current claim pursuant to Section 725.310 (2000). Consequently, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim.

In the present appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence in both claims on the issue of legal pneumoconiosis at Section 718.202(a)(4), and alleges that she failed to comply with the APA in crediting the opinions of Drs. Rasmussen, Koenig, and Perper. Employer further contends that the administrative law judge applied an improper standard in weighing the evidence on the issues of disability and death causation at 20 C.F.R. §§718.204(c) and 718.205(c). Claimant responds, urging affirmance of the award of benefits in both claims. Employer has replied in support of its position. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief, but has filed a supplemental brief asserting that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as both claims were filed prior to January 1, 2005. Claimant and employer have filed supplemental briefs agreeing with the Director that the recent amendments do not apply.

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).

Employer contends that, in evaluating the medical opinion evidence relevant to the existence of legal pneumoconiosis in the miner's and survivor's claims pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge applied an incorrect legal standard in according less weight to the opinions of Drs. Zaldivar, Fino, Dahhan, Chillag, Castle, Tomashefski, Oesterling, Caffrey, and Bush, by requiring them to rule out coal dust exposure as a cause of the miner's obstructive lung disease. Employer asserts that these opinions are not contrary to the Act and regulations, and that the administrative law judge selectively analyzed the evidence. Employer further maintains that the administrative law judge erroneously discredited its physicians' assessments, that coal dust exposure did not contribute to the miner's obstructive airway disease, based on their understanding of the miner's variable smoking history. Lastly, employer asserts that the administrative law judge failed to adequately explain her rationale, in compliance with the provisions of

³ The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

the APA, for crediting the opinions of Drs. Rasmussen, Koenig, and Perper. Employer's Brief at 9-20.

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 administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the evidence sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge determined that the miner had a three and one-half to seven pack-year smoking history ending in 1958. The administrative law judge summarized the conflicting medical opinions of record, noting their underlying documentation, the employment and smoking histories relied upon, the relative qualifications of the physicians, and the physicians' explanations for their respective conclusions. Decision and Order Awarding Benefits on Remand of a Request for Modification at 10-23, 27; Decision and Order Awarding Benefits on Remand at 4, 11-16. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. See *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). In this case, the administrative law judge determined that Dr. Rasmussen was "well qualified" to provide an opinion, as he was Board-certified in internal and forensic medicine and treated the miner from 1992 through 1999. The administrative law judge acted within her discretion in finding that his opinion, that claimant had severe chronic obstructive lung disease (COPD) and pulmonary emphysema predominantly related to coal dust exposure, cor pulmonale, and possible asthma, was "comprehensive and highly persuasive" and entitled to great probative weight, as it was consistent with her finding of a minimal smoking history⁴ and supported by the treatment records, recent published studies, and physical findings. Decision and Order Awarding Benefits on Remand of a Request for Modification at 27; Decision and Order Awarding Benefits on Remand at 20; Director's Exhibits 12, 37, 42; Claimant's Exhibit 2; see *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Similarly, the administrative law judge permissibly credited Dr. Koenig's opinion, that coal dust exposure was the primary cause of the miner's COPD, which included emphysema and chronic bronchitis, as she determined that Dr. Koenig was well qualified and provided a thorough and highly persuasive review and analysis of the miner's medical records. Decision and Order Awarding Benefits on Remand of a Request for Modification at 28; Director's Exhibits 98, 110; Claimant's Exhibit 1; see

⁴ Dr. Rasmussen initially indicated that the miner never smoked, but later reported that the miner had a minimal smoking history from 1951 to 1958. Director's Exhibit 12, 37, 42; Claimant's Exhibit 2.

Clark, 12 BLR at 1-155. While acknowledging that Dr. Perper's report contained some clerical and/or careless factual errors, the administrative law judge acted within her discretion in finding that Dr. Perper's pathological findings of clinical pneumoconiosis, and his opinion that the miner's emphysema was caused by coal dust exposure, provided reasoned and documented support for the opinions of Drs. Rasmussen and Koenig, based on Dr. Perper's qualifications, his detailed review of the evidence of record, and his reliance on medical literature consistent with the conclusions of NIOSH and the Department of Labor (DOL) in promulgating the current regulations. Decision and Order Awarding Benefits on Remand of a Request for Modification at 28-29; Decision and Order Awarding Benefits on Remand at 21; Claimant's Exhibits 1, 2; *see Clark*, 12 BLR at 1-155; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

By contrast, the administrative law judge acted within her discretion in finding that the opinion of Dr. Zaldivar, that the miner's pulmonary impairment was due to asthma and emphysema caused by smoking, was entitled to less weight because Dr. Zaldivar questioned the attribution of centrilobular emphysema to coal dust exposure in the absence of pathological evidence of macules; he did not believe that the miner quit smoking in 1958, in direct contradiction to the administrative law judge's finding; he did not address the degree of irreversibility demonstrated on the miner's pulmonary function testing; and he failed to adequately explain why twenty-five years of coal dust exposure was not a contributing cause of the miner's emphysema. Director's Exhibits 71-44,81, 95; Employer's Exhibits 5, 13; Decision and Order Awarding Benefits on Remand of a Request for Modification at 29; Decision and Order Awarding Benefits on Remand at 21-22; *see J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125 (2009). Similarly, the administrative law judge permissibly discounted Dr. Fino's opinion, that the miner's disabling respiratory impairment was due to smoking, emphysema, non-occupational chronic bronchitis, and asthma, based on deficiencies in rationale, including his position that the medical literature does not support the proposition that coal dust exposure can cause emphysema that results in an obstructive impairment, which was specifically rejected by DOL in promulgating the current regulations. Director's Exhibits 35, 44, 71-45, 86, 90, 94, 102; Decision and Order Awarding Benefits on Remand of a Request for Modification at 30; *see* 65 Fed. Reg. 79,938-43 (Dec. 20, 2000); *Clark*, 12 BLR at 1-155. The administrative law judge permissibly determined that the opinions of Drs. Chillag and Dahhan, that the miner's impairment was due to asthma and emphysema unrelated to coal dust exposure, were undermined by the fact that the doctors relied on views that the administrative law judge determined were contrary to the prevailing medical science in the preamble to the revised regulations, and Dr. Chillag's opinion was further undermined by his reliance on the opinion of Dr. Fino. *See Obush*, 24 BLR at 1-125. Regarding Dr. Bush's opinion, that the miner's moderate centrilobular emphysema was not due to occupational exposure to coal dust, the administrative law judge permissibly found that it was entitled to little weight and inconsistent with the premises underlying

the regulations, as the doctor did not acknowledge that coal dust can cause emphysema, other than focal emphysema, or that smoking-induced and coal dust-induced emphysema are pathologically similar, or that coal dust causes significant emphysema in the absence of clinical pneumoconiosis. Employer's Exhibit 2; Decision and Order Awarding Benefits on Remand of a Request for Modification at 32-33; *Obush*, 24 BLR at 1-125. The administrative law judge also determined that Dr. Castle's opinion, that the miner's impairment was due to smoking-induced emphysema and asthma, was not sufficiently reasoned, as the doctor relied on an inflated smoking history of "at least twenty-two pack years," contrary to the administrative law judge's finding of a remote and minimal smoking history, and he failed to fully explain how he determined that coal dust was not a contributing cause of the miner's emphysema. Director's Exhibits 88, 91, 94, 103; Decision and Order Awarding Benefits on Remand of a Request for Modification at 31; *see Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21. Further, the administrative law judge permissibly accorded little weight to Dr. Oesterling's conclusions, that the miner's emphysema was caused by smoking, and that emphysema caused by smoking can be distinguished from emphysema caused by coal dust, as they were inconsistent with DOL's conclusion that smoking and coal dust exposure cause similar lung damage and have additive effects. The administrative law judge also rationally accorded less weight to the opinion of Dr. Caffrey, that the miner's centrilobular emphysema was attributable to smoking, as the physician did not agree with the medical literature associating pneumoconiosis with obstructive disease, a position that is inconsistent with the regulations. Decision and Order Awarding Benefits on Remand of a Request for Modification at 32; Employer's Exhibits 1, 4, 9, 10; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Lastly, the administrative law judge determined that Dr. Tomashefski was highly qualified, but rationally found that his opinion was documented but not well-reasoned, because although the doctor acknowledged that his understanding of emphysema and coal dust exposure had become less rigid, and that he no longer believed that coal dust only caused focal emphysema, he failed to provide a plausible rationale for excluding coal dust as a contributing factor in the miner's emphysema. Decision and Order Awarding Benefits on Remand of a Request for Modification at 31; Decision and Order Awarding Benefits on Remand at 22; Director's Exhibit 138; Employer's Exhibit 3, 11, 16; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). As substantial evidence supports the administrative law judge credibility determinations, we affirm her finding of legal pneumoconiosis at Section 718.202(a)(4).

We next address employer's contention that, in considering the cause of claimant's disabling impairment pursuant to Section 718.204(c), the administrative law judge applied an improper standard in weighing the medical opinions of record, and erred in crediting the opinions of Drs. Rasmussen, Perper, and Koenig, over the opinions of the remaining physicians. Employer's Brief at 19-25. Contrary to employer's contention, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar, Fino,

Castle, Chillag, Bush, Dahhan, Oesterling, Caffrey, and Tomashefski, that claimant's disability is unrelated to pneumoconiosis, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-709 (4th Cir. 1995). The administrative law judge properly relied on the opinions of Drs. Rasmussen, Koenig, and Perper, that coal dust was a substantial contributing cause of the miner's disabling respiratory impairment, to support her finding that the evidence established disability causation at Section 718.204(c), and we affirm her findings thereunder, as supported by substantial evidence.

Lastly, employer challenges the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). We find no merit in employer's contention that the administrative law judge erred in crediting the opinions of Dr. Rasmussen and Perper over the opinions of Drs. Zaldivar, Tomashefski, and Caffrey. The administrative law judge acted within her discretion as fact-finder in discrediting the opinion of Dr. Zaldivar regarding death causation because the doctor did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Scott*, 289 F.3d at 263, 22 BLR at 2-372; *Toler*, 43 F.3d at 109, 19 BLR at 2-70; Decision and Order Awarding Benefits on Remand at 24; Employer's Exhibits 5, 13. The administrative law judge further permissibly accorded less weight to the opinion of Dr. Caffrey, as compared to the opinions of Drs. Tomashefski and Perper, because the administrative law judge determined that Dr. Caffrey was not as highly qualified as Drs. Tomashefski and Perper, and his opinion as to the cause of death was refuted by them. *See Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Underwood*, 105 F.3d at 946, 21 BLR at 2-23; *Burns*, 7 BLR at 1-597; Decision and Order Awarding Benefits on Remand at 24-25; Employer's Exhibits 1, 15. The administrative law judge also acted rationally in according greater weight to the opinions of Drs. Rasmussen and Perper on the ground that they were better supported by the weight of the medical evidence of record and ultimately outweighed the opinion of Dr. Tomashefski. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; Employer's Exhibits 3, 16. Consequently, we affirm the administrative law judge's findings pursuant to Section 718.205(c), and affirm her award of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand of a Request for Modification in the miner's claim and her Decision and Order Awarding Benefits on Remand in the survivor's claim are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge