

BRB No. 11-0820 BLA

PEGGY RUTH WARD)
(Widow of JOHN C. WARD))
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 08/24/2012
)
 PEABODY COAL COMPANY)
)
 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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (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 on Remand (07-BLA-5004, 07-BLA-5005) of Administrative Law Judge Daniel F. Solomon awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, 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). This case involves a miner's subsequent claim filed on November 20, 2002, and a survivor's claim filed on January 5, 2005, and is before the Board for the second time. The full procedural history of this case is set forth in the Board's previous decision, in which the Board addressed consolidated appeals by employer and claimant. *Ward v. Peabody Coal Co.*, BRB Nos. 09-0546 BLA/A, 09-0547 BLA/A (June 23, 2010)(unpub.).*

Previously, upon review of employer's appeal of the award of benefits in the miner's claim, the Board affirmed the administrative law judge's findings that the new x-ray evidence established the existence of clinical pneumoconiosis¹ pursuant to 20 C.F.R. §718.202(a)(1), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). However, the Board vacated the administrative law judge's finding that the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) established that the miner also suffered from legal pneumoconiosis,² in the form of chronic obstructive pulmonary disease (COPD), due in part to coal mine dust exposure. Specifically, the Board held that the administrative law judge did not adequately explain his basis for crediting the opinion of Dr. Simpao regarding the etiology of the miner's COPD, and that he mischaracterized Dr. Zachek's opinion as a diagnosis of legal pneumoconiosis, when Dr. Zachek diagnosed the miner with clinical pneumoconiosis only. Further, the Board held that the administrative law judge did not adequately explain his reasons for discounting the opinion of Dr. O'Bryan, that the miner's COPD was due solely to smoking. Therefore, the Board remanded the case for the administrative law judge to reconsider the medical opinion evidence regarding the existence of legal pneumoconiosis. Because the Board vacated the administrative law judge's finding of legal pneumoconiosis, the Board also vacated the finding of total disability due to

¹ Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

² Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

pneumoconiosis³ pursuant to 20 C.F.R. §718.204(c), and instructed the administrative law judge to reconsider that issue, if reached, on remand.

Upon review of claimant's appeal of the denial of benefits in her survivor's claim, the Board affirmed, as supported by substantial evidence, the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). However, because the survivor's claim was potentially affected by recent amendments to the Act contained in Section 1556 of Public Law No. 111-148, the Board instructed the administrative law judge, on remand, to reconsider the survivor's claim in light of those amendments.⁴

On remand, in the miner's claim, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits in the miner's claim. With respect to the survivor's claim, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With respect to the survivor's claim, employer argues that the administrative law judge erred in awarding benefits pursuant to Section 932(l). Employer requests that the Board remand the case with instructions that it be assigned to a different administrative law judge. Claimant responds in support of the administrative law judge's

³ The Board affirmed the administrative law judge's finding that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Ward v. Peabody Coal Co.*, BRB Nos. 09-0546 BLA/A, 09-0547 BLA/A, slip op. at 19-20 (June 23, 2010)(unpub.).

⁴ Because the survivor's claim was filed after January 1, 2005, and was pending on March 23, 2010, it is subject to Section 1556 of Public Law No. 111-148, which reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and the automatic entitlement provision of 30 U.S.C. §932(l). Relevant to the issues that are raised in the current appeal, under 30 U.S.C. §932(l), a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

awards of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response in support of the administrative law judge's award of benefits pursuant to Section 932(l) in the survivor's claim. Employer filed a reply brief, reiterating its contentions on appeal.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

On remand, the administrative law judge reconsidered the medical opinions of Drs. Simpao, Westerfield, O'Bryan, and Zachek regarding the existence of pneumoconiosis. The administrative law judge also considered, for the first time, Dr. Fino's opinion that the miner's disabling COPD was due to smoking, because medical literature indicated that the contribution by coal mine dust exposure to the COPD was not clinically significant.⁶ Employer's Exhibit 3 at 10-12.

The administrative law judge found Dr. Simpao's opinion, that the miner's coal mine dust exposure contributed to his pulmonary impairment, to be well-reasoned and documented, and that it was supported by Dr. Westerfield's well-reasoned opinion that the miner's impairment was due, in part, to the inhalation of coal and rock dust. Further, the administrative law judge found that Dr. Zachek attributed the miner's COPD, in part, to coal mine dust exposure, and therefore determined that Dr. Zachek's opinion also supported Dr. Simpao's opinion. The administrative law judge discounted Dr. O'Bryan's opinion that the miner's COPD was due solely to smoking, because he found that Dr. O'Bryan did not adequately address whether the miner's sixteen years of coal mine dust exposure contributed to that impairment. Further, the administrative law judge

⁵ The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁶ On appeal, neither claimant nor the Director, Office of Workers' Compensation Programs, challenges the administrative law judge's consideration, in the miner's claim, of Dr. Fino's medical opinion, which employer designated as evidence in the survivor's claim only. Review of the record reflects that employer submitted only one affirmative medical report in the miner's claim, leaving a second slot available for Dr. Fino's opinion. *See* 20 C.F.R. §725.414(a)(3)(i).

discounted Dr. Fino's opinion, finding that it was based in part on reasoning that was inconsistent with the Department of Labor's findings regarding the medical literature concerning coal mine dust exposure and its potential to cause significant obstructive lung disease. Therefore, the administrative law judge found the existence of legal pneumoconiosis established.

Turning to the cause of the miner's total disability, the administrative law judge found that the opinions of Drs. Simpao and Westerfield, attributing the miner's disabling COPD, in part, to coal mine dust exposure, established that pneumoconiosis was a substantially contributing cause of the miner's total disability. The administrative law judge discounted Dr. O'Bryan's opinion that the miner's disability was due to smoking, because Dr. O'Bryan did not diagnose the miner with legal pneumoconiosis. Further, the administrative law judge discounted Dr. Fino's opinion, that any contribution by coal mine dust exposure to the disabling COPD was not clinically significant, for the same reasons he gave when determining that legal pneumoconiosis was established.

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Simpao, Westerfield, and Zachek to find that legal pneumoconiosis was established, and in discounting the contrary opinions of Drs. Fino and O'Bryan. Employer's Brief at 13-24.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Substantial evidence supports the administrative law judge's permissible finding that Dr. Simpao's opinion was well-reasoned and documented. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Further, contrary to employer's contention, the administrative law judge acted within his discretion in finding that Dr. Fino's opinion merited less weight, because it was based on reasoning inconsistent with the medical science accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. 20 C.F.R. §718.201(a)(2); see *Cumberland River Coal Co. v. Banks*, F.3d , 2012 WL 3194224 (6th Cir. Aug. 8, 2012); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Additionally, the administrative law judge permissibly discounted Dr. O'Bryan's opinion because Dr. O'Bryan did not adequately explain how he determined that the miner's sixteen years of coal mine dust exposure did not contribute to, or aggravate, his COPD. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Because the administrative law judge

reasonably relied on Dr. Simpao's opinion, as supported by that of Dr. Westerfield,⁷ and permissibly discounted the contrary medical opinions of Drs. Fino and O'Bryan, we affirm the administrative law judge's finding that claimant established that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁸

Employer argues further that the administrative law judge erred in his analysis of the medical opinion evidence when he found that the miner was totally disabled due to legal pneumoconiosis⁹ pursuant to 20 C.F.R. § 718.204(c). Employer's Brief at 25-27. We disagree.

Contrary to employer's contention, the administrative law judge permissibly relied on the opinions of Drs. Simpao and Westerfield, that both smoking and coal mine dust exposure contributed to the miner's impairment, to find that claimant established that legal pneumoconiosis was a substantially contributing cause of the miner's total disability pursuant to 20 C.F.R. §718.204(c). *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004). Moreover, the administrative law judge reasonably discounted Dr. Fino's opinion, that any contribution to the disabling COPD from coal mine dust exposure was not clinically insignificant, for the same reasons he gave in discounting Dr. Fino's opinion on the issue of legal pneumoconiosis. *See Banks*, 2012 WL 3194224 at *7-9; *Looney*, 678 F.3d at 313. Additionally, the administrative law judge permissibly discounted Dr. O'Bryan's opinion on the cause of disability, because the physician did not diagnose legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818,

⁷ Employer incorrectly asserts that Dr. Westerfield did not link the miner's respiratory impairment to coal mine dust exposure. Employer's Brief at 20; Director's Exhibit 33-7.

⁸ Any error in the administrative law judge's characterization of Dr. Zachek's opinion as an additional diagnosis of legal pneumoconiosis was harmless, as substantial evidence supports the administrative law judge's finding of legal pneumoconiosis, based on the opinions of Drs. Simpao and Westerfield. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁹ Employer's argument that the administrative law judge erred by not determining whether the miner was totally disabled due to clinical or legal pneumoconiosis, or both, is contradicted by its argument that, "The [administrative law judge's] decision rests on the theory that [the miner] ha[d] legal pneumoconiosis and [was] totally disabled by it." Employer's Reply Brief at 1.

825-26, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Therefore, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). Based on the foregoing discussion, we affirm the administrative law judge's award of benefits in the miner's claim.

The Survivor's Claim

On remand, the administrative law judge found that claimant was automatically entitled to receive benefits pursuant to Section 932(l), based on the award of benefits in the miner's claim. On appeal, employer challenges the applicability of Section 932(l) to this case.¹⁰

Employer argues that Section 932(l) is "constitutionally suspect" because of "its retroactive impact for the imposition of liability for past conduct." Employer's Brief at 28. Employer further contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer's Brief at 27. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-76-85 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012) (No. 11-1342), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

Employer next argues that amended Section 932(l) creates an irrebuttable presumption, in violation of the Constitution and the Act, that the miner's death was "influenced by" pneumoconiosis. Employer's Brief at 30. The United States Court of Appeals for the Third Circuit recently rejected that argument. *Campbell*, 662 F.3d at 254-58, 25 BLR at 2-47-53. For the reasons set forth in *Campbell*, we reject employer's argument. *See Wright v. Eastern Associated Coal Corp.*, BLR , BRB No. 11-0613 BLA (May 24, 2012).

In this case, it is uncontested that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law

¹⁰ Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

judge's determination that claimant is entitled to receive benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l). Because we have affirmed the awards of benefits in both claims, employer's request to reassess this case is moot.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge