BRB No. 13-0122 BLA

EUGENE R. LOVELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 08/29/2013
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

H. Kent Hendrickson (Rice & Hendrickson), Harlan, Kentucky, for employer.[1]

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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

[1] Employer is self-insured through U.S. Steel & Carnegie Pension Fund.

Employer appeals the Decision and Order (2011-BLA-05544) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on December 29, 2009.[2] Director's Exhibit 2.

After crediting claimant with 5.8 years[3] of coal mine employment, the administrative law judge found that the medical evidence developed since the denial of claimant's previous claim established that claimant has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement since the denial of his prior claim, pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that the medical opinion evidence established that claimant has legal pneumoconiosis.[4] The administrative law judge further found that the medical evidence established that claimant is totally disabled by a respiratory impairment, and that legal pneumoconiosis is a substantially contributing cause of his total disability, pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that claimant established legal pneumoconiosis, and that he is totally disabled due to legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in referring to the regulatory

[2] Claimant's prior claim, filed on June 7, 2004, was finally denied because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1.

[3] Claimant is unable to invoke the presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he did not establish fifteen years of coal mine employment. 30 U.S.C. §921(c)(4).

[4] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

preamble when assessing the credibility of the medical opinion evidence on the issue of legal pneumoconiosis.[5]

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.[6] 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, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Al-Khasawneh and Dahhan. Dr. Al-Khasawneh diagnosed legal pneumoconiosis, in the form of an obstructive pulmonary impairment due to both cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibits 11, 15. Dr. Dahhan also diagnosed claimant with an obstructive pulmonary impairment, but opined

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 5.8 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), and thus has established a change in an applicable condition of entitlement since the denial of his prior claim, pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's finding, on the merits, that claimant established the existence of a totally disabling respiratory impairment, pursuant 20 C.F.R. §718.204(b)(2). *See Skrack*, 6 BLR at 1-711.

[6] Although the administrative law judge stated that claimant's last coal mine employment was in Kentucky, where he worked for employer, Decision and Order at 2, the record reflects that claimant subsequently worked in the coal mine industry in Virginia. Director's Exhibit 1. Thus, 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 (1989) (en banc).

that it is unrelated to coal mine dust exposure, and is consistent with claimant's smoking history. Director's Exhibit 28.

The administrative law judge found the opinion of Dr. Al-Khasawneh to be well-reasoned and consistent with the regulations. Conversely, the administrative law judge discounted the opinion of Dr. Dahhan, finding it to be not well-reasoned and less consistent with the premises underlying the regulations, as set forth by the Department of Labor (DOL) in the regulatory preamble when it revised the definition of pneumoconiosis. Therefore, the administrative law judge credited the opinion of Dr. Al-Khasawneh over that of Dr. Dahhan, and found that the evidence established the existence of legal pneumoconiosis. Decision and Order at 7-8.

Employer asserts that the administrative law judge erred in discounting Dr. Dahhan's opinion, that claimant's obstructive impairment is unrelated to coal mine dust exposure. We disagree. The administrative law judge correctly noted that Dr. Dahhan relied, in part, on a study by Attfield & Hodous to calculate that claimant's loss of lung function related to coal mine dust would be 5-9 cc of his FEV1 per year, while claimant demonstrates a loss of about 1800 cc. Decision and Order at 7; Director's Exhibit 28 at 2-3. Based on this study, Dr. Dahhan concluded that claimant's loss of FEV1 "cannot be accounted for by the obstructive impact of coal dust on the respiratory system." Director's Exhibit 28 at 2. The administrative law judge initially found that Dr. Dahhan's reliance on the Attfield & Hodous study to support his opinion is misplaced, as the study concluded that there is a clear relationship between coal mine dust exposure and a decline in pulmonary function of 5-9 milliliters per year. Decision and Order at 7; 65 Fed. Reg. 79,940 (Dec. 20, 2000). Further, the administrative law judge noted that the preamble acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive. Decision and Order at 7, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000). In light of these accepted studies, the administrative law judge found Dr. Dahhan's opinion, that claimant's obstructive impairment is in no way related to coal mine dust exposure, to be not well-reasoned. Decision and Order at 7-8.

Contrary to employer's argument, in summarizing the Attfield & Hodous study, the administrative law judge did not refer to evidence outside of the record, in violation of the Administrative Procedure Act, 5 U.S.C. §556(e), as incorporated into 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). Employer's Brief at 4-7. The portions of the study discussed by the administrative law judge are contained in the preamble to the regulations, 65 Fed. Reg. 79,940-41, which sets forth the medical and scientific bases for the regulations. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Further, the preamble does not constitute evidence outside the record, and may be consulted by an administrative law judge in evaluating expert medical opinions. *See*

Looney, 678 F.3d at 314-15, 25 BLR at 2-130; *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). Therefore, the administrative law judge permissibly found Dr. Dahhan's opinion, that no portion of claimant's obstruction is "caused by, related to, contributed to or aggravated by" coal mine dust exposure, to be inadequately explained in light of the accepted scientific evidence, as determined by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); Decision and Order at 7.

In contrast, the administrative law judge permissibly credited Dr. Al-Khasawneh's opinion, that claimant's obstructive impairment is due to both coal mine dust exposure and smoking, over Dr. Dahhan's contrary opinion, because he found Dr. Al-Khasawneh's opinion to be better reasoned and more consistent with the findings of DOL, as set forth in the preamble to the revised regulations. *See Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; Decision and Order at 8, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Because the administrative law judge specifically found that Dr. Al-Khasawneh set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's lung disease is due to both smoking and coal mine dust exposure, consistent with the findings of the DOL, we affirm the administrative law judge's determinations to credit Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis, and to discredit the opinion of Dr. Dahhan. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). We further affirm, as supported by substantial evidence, the administrative law judge's finding that when all the evidence is considered, claimant established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4).[7] *Compton*, 211 F.3d at 211, 22 BLR at 2-174; Decision and Order at 8.

The administrative law judge next addressed whether the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[7] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found that he was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 8.

The administrative law judge rationally discounted the opinion of Dr. Dahhan because he did not 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 Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 28. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. AL-Khasawneh to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Al-Khasawneh's opinion supported a finding that claimant is totally disabled due to legal pneumoconiosis. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge