

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB Nos. 18-0306 BLA
and 18-0487 BLA

PHYLLIS SIPLES (Widow of and o/b/o
DELBERT L. SIPLES))

Claimant-Respondent)

v.)

BRAZIL COAL & CLAY CORPORATION)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 08/29/2019

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Attorney's Fee Order of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Walter E. Harding (Boehl Stopher & Graves, LLP), Louisville, Kentucky, for employer.

Before: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06034) of Administrative Law Judge Jason A. Golden, rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). Employer also appeals

the administrative law judge's May 22, 2018 Attorney's Fee Order (2012-BLA-06034 and 2015-BLA-05193) granting an attorney's fee and expenses.¹ This case involves a miner's subsequent claim filed on June 6, 2011.²

Based on his finding that the miner had fourteen years of coal mine employment, the administrative law judge concluded claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.³ 30 U.S.C. §921(c)(4) (2012). He also found no evidence of complicated pneumoconiosis, precluding invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Considering whether claimant is entitled to benefits without the presumptions, the administrative law judge found claimant established the miner had legal pneumoconiosis⁴ and a totally

¹ Employer's appeal of the administrative law judge's Decision and Order awarding benefits (2012-BLA-06034) was assigned BRB No. 18-0306 BLA and its appeal of the administrative law judge's Attorney's Fee Order (2012-BLA-06034 and 2015-BLA-05193) was assigned BRB No. 18-0487 BLA. Employer also appealed the administrative law judge's March 23, 2018 Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act (2015-BLA-05193). That appeal, assigned BRB No. 18-0493 BLA, was subsequently dismissed as untimely and employer's remaining appeals were consolidated for purposes of decision only. *Siples v. Brazil Coal & Clay Corp.*, BRB Nos. 18-0306 BLA, 18-0487 BLA and 18-0493 BLA (Aug. 10, 2018) (Order) (unpub.).

² The miner's prior claim, filed on September 7, 2001, was denied on November 13, 2002 because he failed to establish any element of entitlement. Director's Exhibit 1. The miner took no further action until he filed this subsequent claim. The miner died on September 28, 2014. Claimant, the miner's widow, is pursuing his 2011 subsequent claim. Director's Exhibits 2, 34.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis where the claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. 921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment

disabling respiratory impairment and, therefore, established a change in an applicable condition of entitlement.⁵ He further found claimant established the miner's total disability was due to legal pneumoconiosis and awarded benefits. In a May 22, 2018 Attorney's Fee Order, the administrative law judge granted claimant's counsel a fee of \$9,120.50 and \$1,724.51 in expenses.

On appeal, employer asserts the administrative law judge erred in finding claimant established legal pneumoconiosis and the miner's disability was due to legal pneumoconiosis. Employer also contests the award of attorney's fees, as premature. Claimant responds in support of the awards of benefits and attorney's fees. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.⁶

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.⁷ 33 U.S.C. §921(b)(3), as incorporated by 30

significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁵ Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The miner's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 3. Consequently, to obtain review of the merits of the miner's claim, claimant had to establish one element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

⁶ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9, 30-33.

⁷ Claimant was last employed in the coal mining industry in Indiana. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 9, 10; Employer's Exhibit 24 at 12.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner’s Claim

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer contends the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis.⁸ See 20 C.F.R. §718.202(a)(4); Employer’s Brief at 5-11. In order to establish legal pneumoconiosis, claimant must prove the miner had “a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

The administrative law judge considered the opinions of Drs. Houser, Dultz, and Repsher.⁹ Dr. Houser diagnosed legal pneumoconiosis in the form of emphysema and chronic bronchitis due to a combination of coal mine dust exposure and cigarette smoking. Decision and Order at 20-21, 26-27; Claimant’s Exhibit 7 at 8. Dr. Dultz similarly diagnosed legal pneumoconiosis in the form of emphysema due to coal mine dust exposure

⁸ The administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis through any of the available methods at 20 C.F.R. §§718.107, 718.202(a)(1)-(4). Decision and Order at 46-54.

⁹ The administrative law judge also considered the opinion of Dr. Samaan, the miner’s treating physician. He noted Dr. Samaan initially diagnosed a “coal occupational lung disease.” Director’s Exhibit 21. At his subsequent deposition, however, Dr. Samaan called that diagnosis into question by acknowledging his incorrect assumption that the miner was a non-smoker, and stating that without a biopsy a physician could not determine whether emphysema was due to smoking or coal dust exposure. Employer’s Exhibit 5 at 14-16, 20-21. Thus the administrative law judge found Dr. Samaan’s diagnosis of legal pneumoconiosis equivocal and vague and entitled to little weight. Decision and Order at 27-28.

and smoking. Decision and Order at 18-19, 26-27; Director's Exhibit 12 at 1, 24-26; Claimant's Exhibit 8 at 14-15. In contrast, Dr. Repsher opined the miner did not have legal pneumoconiosis, but had severe chronic obstructive pulmonary disease (COPD), bullous emphysema and respiratory bronchiolitis interstitial lung disease, due solely to smoking. Decision and Order at 19-20, 28-29; Director's Exhibit 26 at 4, 7-10.

The administrative law judge credited Drs. Houser and Dultz over Dr. Repsher because he found their opinions better reasoned and more consistent with scientific studies found credible by the Department of Labor (DOL) in the preamble to the revised regulations. The administrative law judge therefore found the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

We reject employer's assertion that the opinions of Drs. Houser and Dultz are not sufficient to establish legal pneumoconiosis because they could not apportion the relative contributions of coal mine dust and smoking to the miner's COPD/emphysema and chronic bronchitis. Employer's Brief at 10-12. As the administrative law judge observed, Dr. Houser based his conclusions on a review of medical records, including treatment records, pulmonary function testing, x-rays, computed tomography scans, and the medical reports and depositions of various physicians. Decision and Order at 20-21, 27; Claimant's Exhibit 7. Additionally, Dr. Houser cited medical literature that coal dust exposure causes COPD/emphysema and that the effects are additive with smoking, amplifying and accelerating the rate of respiratory function decline. Decision and Order at 20-21, 27; Claimant's Exhibit 7 at 7-8. While Dr. Houser acknowledged that "it remains difficult to apportion the relative contributions of smoking, occupational exposures, and other factors in individual patients," he unequivocally opined the miner's disabling emphysema and chronic bronchitis are "manifestations of legal pneumoconiosis." Decision and Order at 20-21, 27; Claimant's Exhibit 7 at 8.

Similarly, the administrative law judge noted Dr. Dultz examined the miner and based his diagnosis of legal pneumoconiosis on substantially accurate smoking and work histories, physical examination results, symptomology, objective testing, and x-ray evidence. Decision and Order at 18-19; Director's Exhibit 12; Claimant's Exhibit 8. Like Dr. Houser, Dr. Dultz acknowledged he could not assign a percentage to the relative contributions of coal mine dust and smoking to the miner's emphysema because the effects are additive. Claimant's Exhibit 8 at 14-15. He unequivocally concluded, however, both exposures contributed to the miner's emphysema. Director's Exhibit 12.

In crediting Drs. Houser and Dultz, the administrative law judge permissibly found their opinions well-reasoned and well-documented. *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). He also found them consistent with scientific studies found credible by the DOL that coal mine dust is associated with clinically significant airways

obstruction and chronic bronchitis and the risk is additive with cigarette smoking. *See* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726 (7th Cir. 2008); *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 893 (7th Cir. 2002); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 26, 29-30.

Moreover, contrary to employer's argument, a physician need not apportion a specific percentage of a miner's lung disease to cigarette smoke versus coal mine dust exposure to establish the existence of legal pneumoconiosis. Employer's Brief at 10-12. The physician need only credibly diagnose a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that a claimant can satisfy this burden by showing coal dust exposure contributed "at least in part" to the miner's respiratory or pulmonary impairment. *See Beeler*, 521 F.3d at 725-26; *Freeman United Coal Mining Co. v. Director, OWCP [Shelton]*, 957 F.2d 302, 303 (7th Cir. 1992). As Drs. Houser and Dultz credibly attributed the miner's COPD/emphysema and chronic bronchitis to a combination of factors, including coal mine dust exposure, the administrative law judge permissibly found their opinions consistent with the regulations and sufficient to establish legal pneumoconiosis. *See Beeler*, 521 F.3d at 725-26; Decision and Order at 26-27; Director's Exhibit 12; Claimant's Exhibits 7, 8. We thus affirm the administrative law judge's determination to assign "probative weight" to the medical opinions of Drs. Houser and Dultz as supported by substantial evidence.¹⁰ *See Beeler*, 521 F.3d at 725; Decision and Order at 26-27.

Employer also argues the administrative law judge erred in discrediting the opinion of Dr. Repsher. Employer's Brief at 7-9. We disagree. The administrative law judge noted Dr. Repsher examined claimant, took relevant histories, performed objective tests, and is well-qualified. Decision and Order at 28. He accurately observed Dr. Repsher concluded the miner did not have legal pneumoconiosis based, in part, on his view that the miner's markedly disproportionate FEV1/FVC ratio constituted a pattern of impairment characteristic of obstruction related to cigarette smoking, not coal dust exposure. The administrative law judge permissibly discounted this aspect of Dr. Repsher's opinion as inconsistent with the medical science accepted by the DOL that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the

¹⁰ Employer concedes that the opinions of Drs. Houser and Dultz "may meet the 'in part' standard . . ." Employer's Brief at 5.

FEV1/FVC ratio. *See* 20 C.F.R. §718.204(b)(2)(i)(C); 65 Fed. Reg. at 79,943; *see Beeler*, 521 F.3d at 726; Decision and Order at 29.

Additionally, Dr. Repsher's view that only a small percentage of miners develop clinically significant reductions in their FEV1 conflicts with the DOL's recognition that coal dust-induced COPD is clinically significant and that the causal relationship between coal dust and COPD is not merely rare. *See Beeler*, 521 F.3d at 726; 65 Fed. Reg. at 79,939-45; Decision and Order at 28. Moreover, contrary to employer's contention, in light of the scientific premises underlying the regulations that coal dust and smoking cause damage to the lungs by similar mechanisms and can have additive effects, the administrative law judge permissibly found Dr. Repsher failed to credibly explain how he eliminated the miner's significant coal dust exposure as a contributing or aggravating factor in the miner's obstructive impairment. *See* 65 Fed. Reg. at 79,940; *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69 (7th Cir. 2001); *Clark*, 12 BLR at 1-155; Decision and Order at 28-29; Employer's Brief at 9.

It is the job of the administrative law judge to weigh the evidence, draw inferences, and determine credibility. *Burns*, 855 F.2d at 501. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge permissibly credited the opinions of Drs. Houser and Dultz and rejected the opinion of Dr. Repsher, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Beeler*, 521 F.3d at 725. We also affirm, as supported by substantial evidence, his finding that all of the evidence of record, when weighed together, established that the miner had legal pneumoconiosis at the time of his death. 20 C.F.R. §718.202(a); Decision and Order at 30.

Employer next argues the administrative law judge erred in finding the evidence established the miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c). We disagree. The administrative law judge articulated the proper standard under the regulations for establishing disability causation, i.e., claimant must establish that pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and Order at 33. 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); see *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 495 (7th Cir. 2004); *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990); *Hawkins v. Director, OWCP*, 907 F.2d 697 (7th Cir. 1990).

Moreover, he permissibly considered and weighed the medical opinion evidence relevant to the cause of the miner's disability. The administrative law judge accurately observed although Dr. Repsher diagnosed severe COPD and stated the miner had no coal mine dust-related conditions, he did not offer an opinion on total disability, or the cause of any totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c).¹¹ Decision and Order at 34; Director's Exhibit 26.

Dr. Houser opined the miner "had clear evidence of *disabling* emphysema and chronic bronchitis" which were "manifestations of legal pneumoconiosis, which is a significant factor contributing to his [disabling] hypoxemia."¹² Claimant's Exhibit 7 at 8 (emphasis added). Further, he stated the miner's "emphysema and chronic bronchitis were the predominant factors causing his acute-on-chronic respiratory failure." *Id.* The administrative law judge reasonably inferred these statements, taken together, support the conclusion Dr. Houser considered legal pneumoconiosis to be a significant factor contributing to the miner's disability. See *Burns*, 855 F.2d at 501; Decision and Order at 33-34.

Finally, as the administrative law judge noted, Dr. Dultz attributed the miner's disability solely to his emphysema. Decision and Order at 33. In light of his determination to credit Dr. Dultz's opinion that the miner's emphysema was legal pneumoconiosis, which we have affirmed, the administrative law judge rationally determined Dr. Dultz's credible

¹¹ The administrative law judge further found even if Dr. Repsher had clearly opined the miner's chronic obstructive pulmonary disease was disabling, but not due to pneumoconiosis, his opinion would not be credible because there were no specific or persuasive reasons to conclude Dr. Repsher's opinion on the issue of disability causation was independent from his opinion regarding the existence of legal pneumoconiosis. Decision and Order at 34, citing *Amax Coal Co. v. Director, OWCP*, 312 F.3d 882, 890 (7th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Adams v. Director OWCP*, 886 F.2d 818, 826 (6th Cir. 1989).

¹² Dr. Houser correctly noted the miner's most recent blood gas study dated March 8, 2012 showed significant hypoxemia at rest and demonstrated total disability under the regulations. See 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 21; Claimant's Exhibit 7 at 3.

opinion establishes the miner's disability was due to legal pneumoconiosis. *See* 20 C.F.R. §718.204(c); Decision and Order at 33; Director's Exhibit 12.

As substantial evidence supports the administrative law judge's findings that the opinions of Drs. Houser and Dultz are well-reasoned and establish that pneumoconiosis was a substantially contributing cause of the miner's disability, we affirm his finding of disability causation pursuant to 20 C.F.R. §718.204(c). *See Beeler*, 521 F.3d at 725; *Burns*, 855 F.2d at 501; Decision and Order at 34. We, therefore, affirm the award of benefits in the miner's claim.

Attorney's Fee Award

Claimant's counsel submitted an itemized fee petition to the administrative law judge requesting fees and expenses totaling \$10,845.01 for work performed before him from August 21, 2015 through March 26, 2017 in the miner's and survivor's claims. Attorney's Fee Order at 2. The administrative law judge rejected employer's objection that the fee request was premature and, after considering the criteria set forth at 20 C.F.R. §725.366, awarded the requested fee and expenses in full. *Id.*

On appeal, employer asserts the administrative law judge prematurely granted the fee petition, contending that because it had appealed both the miner's and survivor's claims to the Board the awards were not final. Employer's Brief at 4. We disagree. A fee award does not become effective and enforceable until there is a successful prosecution of the claim and an award of benefits is payable. It thus was reasonable for the administrative law judge, as a matter of judicial efficiency, to render his decision on counsel's attorney fee petition subject to final adjudication of the claim. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); Attorney's Fee Order at 2. Because employer does not otherwise challenge the administrative law judge's award of counsel's attorney fee, we affirm the administrative law judge's Attorney's Fee Order granting claimant's counsel a total fee and expenses of \$10,845.01.¹³ *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

¹³ Because we have affirmed the administrative law judge's award of benefits in the miner's claim, and dismissed employer's appeal of the award of benefits in the survivor's claim, employer's request to hold the Attorney's Fee Order in abeyance is moot. Employer's Brief at 4.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in the miner's claim and the Attorney's Fee Order are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge