

BRB No. 10-0204 BLA

MARY E. FRALEY)
(Widow of JOE FRALEY))
)
Claimant-Respondent)
)
v.) DATE ISSUED: 12/21/2010
)
LEEMIKE COAL COMPANY)
)
and)
)
EMPLOYERS INSURANCE OF WAUSAU)
)
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 William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Paul L. Edenfield (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-0600) of Associate Chief Administrative Law Judge William S. Colwell rendered on a survivor's claim 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)).¹ The administrative law judge credited the miner with twenty-seven years of coal mine employment, as stipulated.² Based on the award of benefits in the miner's claim for lifetime benefits, the administrative law judge found that employer was precluded from relitigating the issue of the existence of clinical pneumoconiosis,³ which was established in the miner's claim. Further, the administrative law judge found that claimant established that the miner also had legal pneumoconiosis,⁴ in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). Finally, the administrative law judge found that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of clinical pneumoconiosis. Employer further asserts that the administrative law judge erred in finding that the miner had legal pneumoconiosis pursuant to Section 718.202(a)(4)

¹ Claimant is the surviving spouse of the miner, who died on March 28, 2004. At the time of his death, the miner was receiving benefits pursuant to a final award on his lifetime claim. Director's Exhibit 8. Claimant filed her claim for survivor's benefits on April 5, 2004. Director's Exhibit 2 at 1.

² The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 3 at 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ Clinical pneumoconiosis is a disease "characterized by [the] 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).

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).

and, therefore, erred in finding that the miner's death was due to legal pneumoconiosis pursuant to Section 718.205(c). Claimant responds that, under a recent amendment to the Act, she is automatically entitled to survivor's benefits based on the miner's lifetime award. *See* 30 U.S.C. §932(l). The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief in this appeal, but notes that the recent amendments to the Act do not apply to this claim, based on its filing date. Employer filed a reply brief, reiterating its contentions on appeal, and asserting that the recent amendments to the Act do not apply to this claim.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. 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (3), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

We first address employer's challenge to the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge considered the opinions of Drs. Alam,

⁵ We agree that the recent amendments to the Act do not apply to this claim. Those amendments, which were enacted by Section 1556 of Public Law No. 111-148, apply to claims that were filed after January 1, 2005, and which were pending on March 23, 2010. Pub. L. No. 111-148, §1556(c) (2010). As claimant filed her claim on April 5, 2004, the amendments do not apply to her claim. Therefore, we deny claimant's Motion to Remand this case to the district director for the payment of benefits, based on the amendments to the Act.

Baker, Castle, and Repsher.⁶ Dr. Alam diagnosed the miner with hypoxemia due to both smoking and coal mine dust exposure, and opined that the miner's emphysema and chronic bronchitis were significantly aggravated by his coal mine dust exposure. Claimant's Exhibit 7 at 15-19. Dr. Baker diagnosed the miner with hypoxemia, chronic obstructive airways disease, and chronic bronchitis, all due to both smoking and coal mine dust exposure. Claimant's Exhibit 1 at 5. By contrast, Drs. Repsher and Castle opined that the miner had COPD that was due solely to smoking. Director's Exhibit 10 at 6-7; Employer's Exhibits 1 at 2; 2 at 2.

The administrative law judge found that the opinions of Drs. Alam and Baker were well-documented and reasoned opinions that the miner's COPD "stemmed from smoking and coal dust exposure. . . ." Decision and Order at 18. By contrast, the administrative law judge found that Dr. Repsher's opinion attributing the miner's COPD solely to smoking "los[t] probative value," because it was insufficiently reasoned and based on views inconsistent with the premises underlying the regulations. Decision and Order at 14-18. Further, the administrative law judge discounted Dr. Castle's opinion because it was "cursory" and lacked an adequate explanation for the doctor's conclusion that the miner's COPD was due to smoking alone.⁷ *Id.* at 18. Finding that, "[o]verall, the opinion of Dr. Alam [was] better explained and better supported by the medical evidence of record," the administrative law judge found that the miner suffered from legal pneumoconiosis. *Id.* at 18-19.

Employer argues that the administrative law judge erred in relying on Dr. Alam's opinion because Dr. Alam understated the miner's smoking history. We disagree. Although Dr. Alam initially believed that the miner's smoking history was eighteen pack years, Dr. Alam later corrected his impression to fifty pack-years. Claimant's Exhibit 7 at 11, 13. Based on that smoking history, Dr. Alam still opined that the miner's years of coal mine dust exposure substantially aggravated his emphysema and chronic bronchitis. Claimant's Exhibit 7 at 17.

Employer additionally contends that the administrative law judge erred in finding Dr. Alam's opinion to be well-reasoned, because Dr. Alam did not adequately explain

⁶ The administrative law judge also reviewed the miner's medical treatment records. As summarized by the administrative law judge, those records listed diagnoses of COPD and hypoxemia, but did not indicate whether those conditions were related to coal mine dust exposure. Director's Exhibits 9, 11; Claimant's Exhibits 3-5.

⁷ Employer does not challenge the administrative law judge's credibility determination with respect to Dr. Castle's opinion. Thus, that finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

why the miner's hypoxemia and chronic bronchitis were related to the miner's coal mine dust exposure. We disagree. Dr. Alam attributed the miner's pulmonary problems to both coal mine dust exposure and smoking, explaining that there was no method by which he could distinguish between the effects from smoking and those from coal mine dust exposure. Claimant's Exhibit 7 at 15-17, 23, 33-34. To establish the existence of legal pneumoconiosis, claimant need only prove that the miner's chronic respiratory or pulmonary impairment was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-482 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Further, whether a physician's opinion is adequately reasoned is a credibility determination for the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). As substantial evidence supports the administrative law judge's permissible determination that Dr. Alam's opinion was a well-reasoned diagnosis of legal pneumoconiosis, we reject employer's allegation of error. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer next argues that the administrative law judge erred in discounting Dr. Repsher's opinion because it was insufficiently reasoned.⁸ Specifically, employer contends that, contrary to the administrative law judge's finding, Dr. Repsher explained why the miner's obstruction was due to smoking and not coal mine dust exposure. Employer essentially requests that we reweigh the medical evidence, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge considered Dr. Repsher's opinion, and found that it was premised on views contrary to the Department of Labor's (DOL's) findings that it set forth in the preamble to the regulations when it revised the definition of legal pneumoconiosis to include chronic obstructive impairments that arise out of coal mine employment. Specifically, the administrative law judge found that Dr. Repsher's opinion, that the miner's COPD was due solely to smoking because "[c]igarette smoking is the most common and powerful cause of COPD," Employer's Exhibit 1 at 3, was inconsistent with DOL's findings that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and at the same rate. 65 Fed. Reg. 79,938, 79,943 (Dec. 20, 2000); Decision and Order at 16-17. Further, the administrative law judge discounted Dr. Repsher's opinion, that "the average loss of FEV1 [due to coal mine dust] is so small, that it is not detectable in an individual miner," Employer's

⁸ We need not address employer's contention that the administrative law judge erred in finding Dr. Repsher's opinion to be "hostile" to the Act, as the administrative law judge did not discount Dr. Repsher's opinion on that basis. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987).

Exhibit 1 at 3, because it ignored the DOL's finding, based on the prevailing medical literature, that coal mine dust exposure is additive to smoking in causing clinically significant obstruction. 65 Fed. Reg. 79,940 (Dec. 20, 2000); Decision and Order at 17.

Contrary to employer's contention, a determination of whether a medical opinion is supported by accepted scientific evidence as determined by DOL is a valid criterion in deciding whether to credit a medical opinion. *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Thus, the administrative law judge permissibly discredited Dr. Repsher's opinion because it was based on a view of the medical science at odds with that credited by DOL. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009); *Mountain Clay, Inc. v. Collins*, 256 F. App'x. 757 (6th Cir. Nov. 29, 2007)(unpub.); *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O. [Obush]*, 24 BLR at 1-125-26. Moreover, the administrative law judge permissibly discounted Dr. Repsher's opinion, that the miner's COPD was unrelated to coal dust exposure, because the doctor did not adequately explain his opinion in light of the findings regarding the miner in this specific case. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Because the administrative law judge permissibly relied on Dr. Alam's opinion,⁹ we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), as it is supported by substantial evidence. Further, because claimant established the existence of legal pneumoconiosis based on the medical opinion evidence, a finding that is sufficient to establish the element of pneumoconiosis in her claim, *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985), we need not address employer's contention that the administrative law judge erred in applying the doctrine of collateral estoppel to find that employer was precluded from relitigating the issue of whether the miner also had clinical pneumoconiosis.

⁹ Employer contends, *inter alia*, that the administrative law judge erred in finding that Dr. Baker's diagnosis of legal pneumoconiosis was well-documented and reasoned, when it was based on an inaccurate coal mine employment history. We need not address employer's contentions regarding Dr. Baker's opinion, because the administrative law judge ultimately relied on Dr. Alam's opinion to find legal pneumoconiosis established, as employer concedes on appeal, Employer's Brief at 8, and Dr. Alam's opinion constitutes substantial evidence in support of that finding.

We next address employer's challenge to the administrative law judge's finding that claimant established that the miner's death was due to legal pneumoconiosis pursuant to Section 718.205(c). The administrative law judge considered the opinions of Drs. Alam, Repsher, and Castle.¹⁰ Decision and Order at 19-24. Dr. Alam opined that the miner's death was hastened by pneumoconiosis. Claimant's Exhibit 7 at 27-30. Drs. Castle and Repsher opined that the miner died of a myocardial infarction with congestive heart failure, and that his death was unrelated to pneumoconiosis. Director's Exhibit 10 at 6; Employer's Exhibits 1 at 2; 2 at 2. The administrative law judge discounted the opinions of Drs. Repsher and Castle as to the cause of the miner's death, because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding.¹¹ 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, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 20. The administrative law judge found that Dr. Alam's opinion was well-reasoned and well-documented, consistent with the premises underlying the regulations, and supported a finding of death due to legal pneumoconiosis. Decision and Order at 24.

Employer contends that the administrative law judge erred in relying on Dr. Alam's opinion to find that the miner's death was due to legal pneumoconiosis, because Dr. Alam did not adequately explain how pneumoconiosis hastened the miner's death. Employer's Brief at 10-11. We disagree. Dr. Alam explained at his deposition that legal pneumoconiosis hastened the miner's death by causing the miner to have low blood oxygen, which led to an increasing heart rate, which, in turn, eventually caused his fatal heart attack. Claimant's Exhibit 7 at 28-30. Thus, contrary to employer's contention, Dr. Alam, who the administrative law judge recognized is Board-certified in Internal Medicine and Pulmonary Disease, explained the specifically defined process by which legal pneumoconiosis hastened the miner's death.¹² See *Eastover Mining Co. v.*

¹⁰ As summarized by the administrative law judge, the miner's death certificate, which was completed by a coroner, listed the immediate cause of death as "Congestive Heart Failure/M.I.," due to "COPD." Director's Exhibit 8. As further noted by the administrative law judge, Dr. Baker's opinion did not address the cause of the miner's death. Claimant's Exhibit 1.

¹¹ Employer does not challenge the administrative law judge's discrediting of the opinions of Drs. Repsher and Castle at death causation because they did not diagnose the miner with legal pneumoconiosis. Employer's Brief at 10; see *Skrack*, 6 BLR at 1-711.

¹² We reject employer's allegation that the administrative law judge erred by relying on the opinion of the United States Court of Appeals for the Third Circuit in *Hill*

Williams, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003). Consequently, as employer raises no further arguments regarding the administrative law judge's finding, we affirm the administrative law judge's finding that the miner's death was due to legal pneumoconiosis pursuant to Section 718.205(c), as it is supported by substantial evidence.

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

REGINA C. McGRANERY
Administrative Appeals Judge

v. Director, OWCP, 562 F.3d 264, 24 BLR 2-177 (3d Cir. 2009), for guidance in interpreting Dr. Alam's testimony that low blood oxygen caused by pneumoconiosis hastened the miner's death. Moreover, review of the administrative law judge's Decision and Order reflects that he applied the standard of the Sixth Circuit in determining whether pneumoconiosis hastened the miner's death in this case. Decision and Order at 19.