

BRB No. 07-0425 BLA

K. B.)
)
 Claimant-Respondent)
)
 v.)
)
 ALLEGHENY MINING CORPORATION)
)
 and)
)
 ROCKWOOD CASUALTY INSURANCE) DATE ISSUED: 02/29/2008
 COMPANY)
)
 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-6551) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with 21.85 years of coal mine employment pursuant to the parties' stipulation.¹ Decision and Order at 2. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4), 718.203(b). Further, employer conceded and the administrative law judge found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge also found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in her analysis of the medical opinion evidence when she found that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal.²

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'Keefe 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

¹ The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibit 5. Accordingly, 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, 1-202 (1989)(*en banc*).

² We affirm as unchallenged on appeal the administrative law judge's finding of 21.85 years of coal mine employment, and her finding that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis.³ The administrative law judge considered the opinions of Drs. Parker and Fino.⁴

Dr. Parker, who the administrative law judge noted is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed medical evidence. Director's Exhibit 9; Claimant's Exhibit 5. Dr. Parker concluded that claimant's primary lung impairment was due to inflammation to his airways resulting in severe obstruction that was mainly fixed and only partly reversible. Director's Exhibit 9; Claimant's Exhibit 5 at 36, 47-48. Dr. Parker opined that claimant's severe obstruction due to airway inflammation was aggravated by both his twenty years of coal mine dust exposure and his eight to ten pack-years of smoking. Claimant's Exhibit 5 at 35-37, 56-59, 61, 70, 72. Dr. Parker also diagnosed bullous emphysema, which he defined as the destruction of the walls of the alveoli at the distal ends of claimant's airways. Claimant's Exhibit 5 at 49-55. Dr. Parker opined that the bullous emphysema was aggravated by both coal dust exposure and smoking. Claimant's Exhibit 5 at 53, 63-64, 72-74. Additionally, Dr. Parker diagnosed a small, reversible component of obstruction consistent with asthma. Claimant's Exhibit 5 at 37.

Dr. Fino, who the administrative law judge noted is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed medical evidence. Employer's Exhibit 1. Dr. Fino diagnosed severe bullous emphysema and reversible airway obstruction. Dr. Fino stated that "[t]he most impressive part of [claimant's] lung function is the fixed, or reversible, obstruction secondary to massive bullous emphysema." Employer's Exhibit 1 at 8. Dr. Fino stated that coal dust does not cause bullous emphysema, which is related to smoking or heredity. Dr. Fino indicated that the "reversible complement to [claimant's] airway obstruction is . . . quite impressive," and noted that although claimant's FEV1 value improved after he was administered a bronchodilator, the absolute percentage of FEV1 increased to only 26% of normal. *Id.* Dr. Fino then provided a more extensive statement regarding claimant's reversible obstruction:

³ "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 includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

⁴ The administrative law judge also considered, but discounted, an opinion provided by Dr. Bensenhaver, claimant's treating physician. On appeal, no party has challenged that aspect of the administrative law judge's decision.

Reversible airway obstruction is not consistent with a coal dust-related pulmonary condition. This is consistent with cigarette smoking or asthma. Even if I assume that all of the reversible obstruction was related to coal dust, he would still be as disabled as I find him now. There is a clear cut etiology for reversible obstruction and that is severe bullous emphysema. Bullous emphysema cannot be related to coal mine dust inhalation. Therefore, I can state with a reasonable degree of medical certainty that coal mine dust inhalation did not cause or contribute to this man's disabling respiratory impairment.

Employer's Exhibit 1 at 9.

The administrative law judge found that Dr. Parker's opinion that claimant's bullous emphysema was related to coal dust exposure was not "sufficiently well-reasoned" for her to make a finding on the cause of the bullous emphysema. Decision and Order at 16 n.14. However, the administrative law judge found that Dr. Parker's opinion, that claimant's airway inflammation with airflow obstruction was aggravated by both coal dust exposure and smoking, was well-reasoned.

Employer contends that the administrative law judge erred in finding Dr. Parker's opinion to be well reasoned, when Dr. Parker's pulmonary function study was invalid. Employer's contention lacks merit.

The record reflects that the administrative law judge addressed the validity of Dr. Parker's pulmonary function study when considering his opinion. Decision and Order at 10-11, 18. At his deposition, Dr. Parker explained that although the pulmonary function study he administered to claimant did not meet American Thoracic Society Criteria for reproducibility, the study was interpretable and reflected severe obstruction. Claimant's Exhibit 5 at 20-24. Dr. Parker noted that the obstruction measured was too severe to have been caused by malingering, and he explained that the study was consistent with Dr. Fino's pulmonary function study, which also showed severe obstruction. Claimant's Exhibit 5 at 24-25, 42-44. After considering Dr. Parker's testimony, the administrative law judge noted that both Drs. Parker and Fino "made similar determinations about the nature of claimant's impairment" based on his pulmonary function study, but differed as to its etiology. Decision and Order at 15. She further determined that "Dr. Parker's deposition testimony . . . that [c]laimant's test results could not have been the result of malingering, as well as Dr. Fino's pulmonary function test results, which were not inconsistent with Dr. Parker's, fully establish the [c]laimant's total disability." Decision and Order at 18. Since the administrative law judge considered whether the validity of Dr. Parker's pulmonary function study affected the credibility of his opinion and she reasonably resolved the issue, we reject employer's allegation of error. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Employer contends that the administrative law judge erred in relying on Dr. Parker's opinion because Dr. Parker relied on an incorrect smoking history. We disagree. Dr. Parker initially relied on a smoking history of eight to ten pack years, ending in 1980. Director's Exhibit 9 at 2; Claimant's Exhibit 5 at 35, 61-63. Later, Dr. Parker was informed that although claimant smoked for eight to ten pack-years, he quit in 1990. Dr. Parker indicated that this revised history did not change his opinion as to the contributions of coal dust and smoking to claimant's impairment. Claimant's Exhibit 5 at 66, 72. The administrative law judge considered the differing smoking history, and determined that it had no effect on the credibility of Dr. Parker's opinion:

Although Dr. Parker's initial opinion was based on a smoking history that ended in 1980, not 1990, upon being informed that the [c]laimant stopped smoking in 1990 Dr. Parker did not change his opinion. In this regard . . . the uncontradicted record reflects that the [c]laimant's smoking history was relatively minor (one pack per week for 10 to 11 years).

Decision and Order at 17. The administrative law judge reasonably resolved this issue, and the Board cannot substitute its view for that of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore reject employer's contention.

Employer next argues that the administrative law judge erred "by relying on Dr. Parker's opinion that Claimant's bullous emphysema is causally related to coal mine dust exposure," when there are no scientific studies documenting a causal link. Employer's Brief at 6. Contrary to employer's contention, the administrative law judge declined to rely on this aspect of Dr. Parker's opinion. Decision and Order at 16 n.14. Thus, employer's argument lacks merit and is rejected.

With regard to Dr. Fino, the administrative law judge found that Dr. Fino did not fully address claimant's obstructive impairment, and thus did not submit a well-reasoned report:

Dr. Fino's report recognizes, but does not discuss the etiology of, the [c]laimant's irreversible obstructive impairment. Based on the . . . pulmonary function test results, it is manifestly clear that, even after bronchodilators are administered, the [c]laimant's obstructive impairment was severe. As Dr. Fino himself pointed out, the [c]laimant's FEV1 value (a measure of obstruction) rose from 18% to 26% of normal. Such a severe impairment is almost certainly disabling. Even if I assume (as I do not) that Dr. Fino is correct in stating that bullous emphysema cannot be related to coal mine dust inhalation, his report does not discuss the [c]laimant's underlying impairment, but merely states that the bullous emphysema is the cause of the [c]laimant's reversible obstruction.

Decision and Order at 16. The administrative law judge further found that, “Dr. Fino did not give any rationale for his conclusion that bullous emphysema cannot be caused by coal mine dust inhalation.” Decision and Order at 16 n. 14. She therefore determined that Dr. Fino’s conclusion was not “sufficiently well-reasoned” *Id.*

Employer contends that the administrative law judge misinterpreted Dr. Fino’s opinion in finding that Dr. Fino failed to discuss the etiology of the fixed, irreversible component of claimant’s impairment. Employer’s Brief at 7. Employer argues that Dr. Fino clearly attributed claimant’s entire impairment to bullous emphysema. Upon review, we conclude that the administrative law judge did not mischaracterize Dr. Fino’s report. The record reflects that Dr. Fino discussed reversible obstruction specifically and at length, but mentioned irreversible obstruction in a single sentence: “The most impressive part of [claimant’s] lung function is the fixed, or reversible, obstruction secondary to massive bullous emphysema.” Employer’s Exhibit 1 at 8. Since fixed and reversible impairments are different, this sentence is somewhat ambiguous. The rest of Dr. Fino’s specific discussion addressed the etiology of the reversible component of claimant’s impairment:

The reversible complement to his airway obstruction is actually quite impressive Reversible airway obstruction is not consistent with a coal dust-related pulmonary condition. This is consistent with cigarette smoking or asthma. Even if I assume that all of the reversible obstruction was related to coal dust, he would still be as disabled as I find him now. There is a clear cut etiology for reversible obstruction and that is severe bullous emphysema. Bullous emphysema cannot be related to coal mine dust inhalation. Therefore, I can state with a reasonable degree of medical certainty that coal mine dust inhalation did not cause or contribute to this man’s disabling respiratory impairment.

Employer’s Exhibit at 8-9.

It is the function of the administrative law judge to determine the weight and meaning of ambiguous words or phrases in a witness’s testimony. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999). The administrative law judge interpreted the language of Dr. Fino’s report as acknowledging the presence of a fixed impairment, while specifically discussing the etiology of only the reversible impairment. Because Dr. Fino excluded coal dust exposure as a cause of claimant’s impairment based only on his discussion of the reversible component of claimant’s obstruction, the administrative law judge found Dr. Fino’s reasoning to be inadequate. On this record, we are unable to conclude that no reasonable mind could interpret Dr. Fino’s report in this manner. *See Mays*, 176 F.3d at 764, 21 BLR at 2-606.

Thus, substantial evidence supports the administrative law judge's reading of Dr. Fino's opinion.

Moreover, even if employer is correct that Dr. Fino clearly attributed claimant's entire impairment to bullous emphysema unrelated to coal mine employment, employer has not challenged the administrative law judge's finding that Dr. Fino provided no rationale for his opinion that bullous emphysema cannot be related to coal mine dust inhalation. The administrative law judge determined that Dr. Fino's conclusion on this point was not "sufficiently well-reasoned." The administrative law judge acted within her discretion to find that Dr. Fino's conclusion was not sufficiently well reasoned, and substantial evidence supports the administrative law judge's finding. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). Consequently, employer presents no reason to remand this case for further consideration. Therefore, we affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.204(c), based on Dr. Parker's opinion, the administrative law judge found that pneumoconiosis is a substantially contributing cause of claimant's total disability, in that pneumoconiosis has had a material adverse effect on claimant's pulmonary condition. Employer argues that the administrative law judge substituted her own judgment for a reasoned medical opinion when she reasoned that even if the reversible portion of claimant's impairment is unrelated to coal mine employment, the fact that a fixed, disabling impairment remains suggests that a combination of factors, including pneumoconiosis, causes claimant's impairment. Employer's Brief at 7. Employer's argument lacks merit. The record reflects that when claimant received bronchodilators, his FEV1 improved, but a fixed impairment

remained that was totally disabling. From Dr. Fino's statement that a reversible impairment is not consistent with a coal dust-related condition, and from his silence on the cause of the irreversible impairment, the administrative law judge inferred that the irreversible impairment is consistent with a coal dust-related condition. Thus, the administrative law judge reasonably found that the presence of a fixed impairment supported Dr. Parker's opinion that pneumoconiosis contributed to claimant's total disability. See *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; see also *Consolidation Coal Co. v. Swiger*, 98 Fed.Appx. 227, 237 (4th Cir. 2004). Therefore, we reject employer's argument, and we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge