

BRB Nos. 10-0185 BLA
and 10-0225 BLA

DELORES B. SLONE)	
(o/b/o and Widow of WALTER C. SLONE))	
)	
Claimant-Petitioner)	
Respondent)	
)	
v.)	
)	
ACTION ENERGIES, INCORPORATED)	DATE ISSUED: 02/24/2011
)	
Employer-Respondent)	
Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Stephen Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (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:

Claimant¹ and employer appeal the Decision and Order (08-BLA-5529, 08-BLA-5851) of Administrative Law Judge Daniel F. Solomon awarding benefits on a miner's claim, and denying benefits 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)) (the Act). The Board has consolidated the appeals for purposes of decision only.

After crediting the miner with twenty-seven years of coal mine employment,² the administrative law judge found that the biopsy and medical opinion evidence established the existence of clinical pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(2), (4). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis,⁴ in the form of obstructive airway disease due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). After finding that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that the miner was totally disabled by a respiratory impairment, due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits in the miner's claim.

¹ Claimant is the widow of the miner, who died on March 10, 2007. Director's Exhibit 10. Claimant pursues the miner's lifetime claim, which he filed on September 14, 2006. Director's Exhibit 2. Claimant filed her claim for survivor's benefits on May 29, 2007. Director's Exhibit 48.

² Because the miner's coal mine employment was in Kentucky, 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*); Director's Exhibit 2.

³ 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).

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).

In his adjudication of the survivor's claim, the administrative law judge again found that the relevant medical evidence established the existence of both clinical and legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(2), (4). The administrative law judge, however, found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's award of benefits in the miner's claim, arguing 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). Employer also challenges the administrative law judge's finding that the miner's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With respect to the denial of the survivor's claim, claimant asserts that the administrative law judge erred in failing to find that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, addressing only the impact on this case of recent amendments to the Act.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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

By Order dated June 16, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.⁶ The parties have responded.

⁵ We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2),(4), 718.203(b), and was 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).

⁶ The recent amendments to the Act apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010). Relevant to the claims at issue in this case, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides that if a miner had at least fifteen years of qualifying coal mine employment, and had a totally disabling

Claimant, employer, and the Director state that the recent amendments to the Act may affect these claims, as both were filed after January 1, 2005 and were pending on March 23, 2010. With respect to the miner's claim, the parties agree that, if the award of benefits is not affirmed, the case should be remanded for the administrative law judge to address whether claimant is entitled to the Section 411(c)(4) presumption that was reinstated by Section 1556. With respect to the survivor's claim, the Director and claimant contend that, if the Board affirms the administrative law judge's findings in the miner's claim, and that award becomes final, claimant will be automatically entitled to survivor's benefits pursuant to Section 422(l), 30 U.S.C. §932(l), based on the award in the miner's claim. Director's Brief at 9; Claimant's Supplemental Brief at 2. In contrast, employer states that, because the miner was not receiving benefits at the time of his death, the amendments to 30 U.S.C. §932(l) do not apply to the survivor's claim. Employer's Supplemental Brief at 2.

Before we can determine whether the amended versions of 30 U.S.C. §§921(c)(4) or 932(l) apply to this case, as the Director and claimant note, we must first determine whether the administrative law judge's award of benefits in the miner's claim can be affirmed. Accordingly, we will initially consider employer's allegations of error with respect to the administrative law judge's award of benefits in the miner's claim.

The Miner's Claim

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 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 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).

respiratory impairment, there is a rebuttable presumption that he or she was totally disabled due to pneumoconiosis and that his or her death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The amendments also revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that 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 survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l), *amended by* Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).

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). As noted *supra*, n.5, we have affirmed the administrative law judge's finding that the evidence established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(4). Ordinarily, affirmance of the administrative law judge's finding that the existence of clinical pneumoconiosis was established would obviate the need to review his findings as to the existence of legal pneumoconiosis pursuant to 20 C.F.R. Section 718.202(a)(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). In this case, however, the administrative law judge did not find that the miner was totally disabled due to clinical pneumoconiosis; he found that the miner was totally disabled due to legal pneumoconiosis. Decision and Order at 31. Therefore, we will address employer's challenge to the administrative law judge's finding of legal pneumoconiosis.

Relevant to the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Ebeo,⁷ Mohan,⁸ Rosenberg,⁹ and Jarboe.¹⁰ The administrative law judge found Dr. Ebeo's diagnosis of legal pneumoconiosis, in the form of severe obstructive airway disease due to smoking and coal mine dust exposure, to be well-documented and reasoned. Specifically, the administrative law judge found that Dr. Ebeo based his opinion on valid pulmonary function and blood gas studies, accurate coal mine employment and smoking histories, he explained that he attributed the miner's impairment to both exposures because a recent lung biopsy showed that the miner had anthracosilicosis, and, he explained that it was not possible to apportion the miner's impairment between smoking

⁷ Dr. Ebeo examined the miner on October 4, 2006, and diagnosed "severe obstructive airway disease without bronchodilator response" due to both smoking and coal mine dust exposure. Director's Exhibit 14 at 7, 17.

⁸ Dr. Mohan submitted treatment records and a consultative report. He diagnosed chronic obstructive pulmonary disease due to clinical pneumoconiosis. Claimant's Exhibit 1.

⁹ Dr. Rosenberg submitted a consultative report, stating that the miner "did not have medical or legal [coal workers' pneumoconiosis]. . . . his COPD was consequent to his long smoking history." Employer's Exhibit 1 at 5.

¹⁰ Dr. Jarboe submitted a consultative report, stating that the miner "had well-documented, severe obstructive lung disease." Employer's Exhibit 4 at 6. Dr. Jarboe opined that "this obstructive lung disease was caused by cigarette smoking and reactive airways disease (asthma) and not the inhalation of coal mine dust." *Id.*

and coal mine dust exposure. Director's Exhibit 14 at 17; Decision and Order at 27. By contrast, the administrative law judge discounted the opinions of Drs. Mohan, Rosenberg, and Jarboe. He found that Dr. Mohan's report was not well-documented or reasoned, because Dr. Mohan did not state what medical records he based his opinion on, and it was unclear whether he considered accurate smoking and coal mine employment histories. *Id.* at 28. The administrative law judge also found that the opinions of Drs. Rosenberg and Jarboe were not well-reasoned, because the physicians relied on medical studies relating primarily to clinical pneumoconiosis to determine that the miner did not have legal pneumoconiosis, and the physicians failed to explain how they eliminated the miner's coal mine dust exposure as an aggravating or contributing cause of his chronic obstructive pulmonary disease (COPD). *Id.* at 29. The administrative law judge further discounted Dr. Rosenberg's opinion as internally inconsistent, because Dr. Rosenberg stated both that coal mine dust was not a contributing factor in the miner's COPD, and that the positive biopsy evidence confirmed that coal mine dust exposure had an adverse effect on the miner's respiratory system. *Id.* at 28. Weighing the medical opinions together, the administrative law judge determined that Dr. Ebeo's opinion established the existence of legal pneumoconiosis.

Employer contends that Dr. Ebeo's opinion is unreasoned because Dr. Ebeo provided no "rationale beyond the additive effects of cigarette smoking and coal dust exposure as the basis for his diagnosis of legal pneumoconiosis." Employer's Brief at 18. Employer further asserts that the administrative law judge did not sufficiently analyze the credibility of Dr. Ebeo's opinion. *Id.* at 17.

Employer essentially requests a reweighing of the evidence, which is beyond the Board's scope of review. *Anderson*, 12 BLR at 1-113. The administrative law judge accurately noted that Dr. Ebeo diagnosed an irreversible obstructive impairment based on the miner's October 4, 2006 pulmonary function study. Decision and Order at 29; Director's Exhibit 14 at 7. The administrative law judge explained that he found Dr. Ebeo's finding of no reversibility on the miner's pulmonary function study to be "significant," in view of Dr. Jarboe's opinion that the miner's impairment was reversible and, therefore, was asthma unrelated to coal mine employment. Decision and Order at 29. On appeal, employer does not challenge the administrative law judge's finding that Dr. Ebeo's pulmonary function study detecting no reversibility was a significant test result that supported Dr. Ebeo's opinion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Further, contrary to employer's characterization of Dr. Ebeo's opinion, Dr. Ebeo explained that he attributed the miner's irreversible obstructive impairment to both smoking and coal mine dust exposure because the miner's lung biopsy demonstrated pneumoconiosis, he had significant coal mine employment and smoking histories, and it was impossible to apportion the effects of smoking and coal mine dust exposure on the miner's impairment. Director's Exhibit 14 at 17. In sum, substantial evidence supports the administrative law judge's finding that Dr. Ebeo based

his opinion on his interpretation of the medical evidence of record, and adequately explained why he concluded that the miner's obstructive impairment was due, in part, to coal mine dust exposure. Therefore, the administrative law judge permissibly found that Dr. Ebeo's diagnosis of legal pneumoconiosis was well-reasoned, and sufficient to satisfy claimant's burden of proof. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We reject employer's contention that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. Employer's Brief at 13. The administrative law judge acted within his discretion when he found Dr. Rosenberg's opinion to be internally inconsistent, because Dr. Rosenberg stated both that coal mine dust exposure did not contribute to the miner's COPD, and that the positive biopsy evidence confirmed that coal mine dust exposure had an adverse effect on the miner's respiratory system. *See Martin*, 400 F.3d at 307, 23 BLR at 2-286; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, the administrative law judge permissibly questioned Dr. Rosenberg's opinion, that the miner's COPD was due solely to smoking, because the physician did not adequately explain how he eliminated coal mine dust exposure as a source of the miner's obstructive impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Contrary to employer's assertion, therefore, the administrative law judge acted within his discretion in discounting Dr. Rosenberg's opinion.¹¹ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Further, we reject employer's contention that the administrative law judge erred in finding that Dr. Jarboe did not sufficiently explain his opinion. Employer's Brief at 16-17. Substantial evidence supports the administrative law judge's permissible finding that Dr. Jarboe "relies on the [m]iner's reversibility post-bronchodilator," but "does not address why he believes the degree of reversibility exhibited eliminates the possibility that the [m]iner's pulmonary disorder was . . . contributed [to] or aggravated by coal dust exposure." Decision and Order at 29; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Moreover, employer does not challenge the administrative law judge's alternative finding that Dr. Jarboe's diagnosis of reversible

¹¹ Employer additionally asserts that the administrative law judge erred in discounting Dr. Rosenberg's opinion as based on dated medical studies that relate primarily to clinical pneumoconiosis, and on medical studies that Dr. Rosenberg admitted were speculative. Employer's Brief at 15-16. Because the administrative law judge provided valid, alternative reasons for discounting Dr. Rosenberg's opinion, we need not address these assertions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

airway disease in the form of asthma was undermined by Dr. Ebeo's pulmonary function study, which Dr. Ebeo interpreted as reflecting an irreversible impairment. Decision and Order at 29; Director's Exhibit 14 at 7. The administrative law judge's finding is, therefore, affirmed. *Skrack*, 6 BLR at 1-711. For the foregoing reasons, the administrative law judge permissibly discounted Dr. Jarboe's opinion. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because substantial evidence supports the administrative law judge's findings and credibility determinations under 20 C.F.R. §718.202(a)(4), we affirm his finding that legal pneumoconiosis was established.

Pursuant to 20 C.F.R. §718.204(c), employer asserts that the administrative law judge erred in crediting Dr. Ebeo's opinion as to disability causation. Employer's Brief at 18-20. Specifically, employer alleges that Dr. Ebeo's opinion is unreasoned because it is based upon generalities, and because Dr. Ebeo did not specify the extent to which coal mine dust and smoking each contributed to the miner's disabling obstructive impairment. *Id.* Again, employer essentially requests that we review the credibility of Dr. Ebeo's opinion, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. As discussed above, the administrative law judge permissibly found Dr. Ebeo's opinion, that the miner's obstructive airway disease was due, in part, to coal mine dust exposure, to be well-reasoned. For the same reasons, the administrative law judge permissibly relied on Dr. Ebeo's opinion to find that "the [m]iner's disability was the result of an obstructive airway disease caused by both coal dust inhalation and smoking." Decision and Order at 31; *see Martin*, 400 F.3d at 307, 23 BLR at 2-286; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Director's Exhibit 14 at 17. In so finding, the administrative law judge applied the proper standard, namely, that pneumoconiosis must be a "substantially contributing cause" of the miner's total disability. 20 C.F.R. §718.204(c)(1)(i),(ii). Further, he correctly found that Dr. Ebeo's opinion, attributing the miner's disabling impairment to both legal pneumoconiosis and smoking, was sufficient to meet the substantially contributing cause standard. Decision and Order at 31 n.10, *citing Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). Contrary to employer's contention, there was no need for Dr. Ebeo to specify relative degrees of causal contribution by coal mine dust and smoking for his opinion to be considered a reasoned opinion of total disability due to pneumoconiosis. *See Gross*, 23 BLR at 1-18-19.

We additionally reject employer's assertion that the administrative law judge "erred in rejecting the opinions of Drs. Rosenberg and Jarboe for the reasons cited." Employer's Brief at 21. Contrary to employer's assertion, the administrative law judge permissibly discounted the disability causation opinions of Drs. Rosenberg and Jarboe, because the physicians failed to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *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 31. Based on the foregoing, we affirm the administrative law judge's finding that claimant established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the award of benefits in the miner's claim.¹²

The Survivor's Claim

Turning to the survivor's claim, we reverse the administrative law judge's denial of benefits, as claimant is derivatively entitled to benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), because she filed her claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner has been determined eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*).

¹² In view of our disposition in the miner's claim, we hold that application of Section 411(c)(4) would not alter the outcome in the miner's claim, and thus, that Section 1556 does not affect the miner's claim.

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim is affirmed, the denial of benefits in the survivor's claim is reversed, and this case is remanded to the district director for the entry of an award of survivor's benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge