

BRB No. 10-0322 BLA

OWEN CREECH )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 APOGEE COAL COMPANY )  
 )  
 and )  
 ) DATE ISSUED: 02/23/2011  
 ARCH OF KENTUCKY )  
 )  
 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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Michelle S. Gerdano (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05836) of Administrative Law Judge Kenneth A. Krantz, with respect to a subsequent claim filed on August 23, 2006, 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).<sup>1</sup> After crediting claimant with twenty-seven years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief on the merits in this appeal.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 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).

---

<sup>1</sup> Claimant filed his initial claim for benefits on September 10, 1991, which was denied by the district director on February 6, 1992, because the evidence was insufficient to establish that claimant had a totally disabling impairment and that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant took no further action until he filed the present subsequent claim. Director's Exhibit 3.

<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 11. Accordingly, this case arises within the jurisdiction of the

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

## **I. The Administrative Law Judge's Findings**

In considering whether legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) and whether total disability causation was established at 20 C.F.R. §718.204(c), the administrative law judge evaluated the opinions of Drs. Myers, Baker, Rasmussen, Dahhan, and Broudy. The administrative law judge indicated that, because Drs. Myers and Baker examined claimant approximately eighteen years prior to the hearing, the more recent reports by Drs. Rasmussen, Dahhan, and Broudy were entitled to greater weight.<sup>4</sup> Decision and Order at 25.

The administrative law judge determined that Dr. Rasmussen's diagnosis of legal pneumoconiosis, at 20 C.F.R. §718.202(a)(4), is consistent with the findings of the Department of Labor (DOL), as set forth in the preamble to the revised regulations, and the Attfield and Hodous study, which the DOL cited in support of the revised definition of legal pneumoconiosis.<sup>5</sup> Decision and Order at 29. In addition, the administrative law judge found that Dr. Rasmussen's findings, that coal dust exposure and cigarette smoking cause similar results, and are additive in effect, are consistent with the DOL's conclusions. *Id.*, citing 65 Fed. Reg. 79,939, 79,941 and 79, 943.

---

United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup> Dr. Myers examined claimant on April 30, 1991, and diagnosed chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure. Director's Exhibit 1. Dr. Baker examined claimant, upon the request of the Department of Labor, on October 15, 1991, in conjunction with his initial claim. Claimant's Exhibit 6. Dr. Baker diagnosed COPD and chronic bronchitis due to his coal dust exposure and cigarette smoking. *Id.*

<sup>5</sup> Dr. Rasmussen diagnosed COPD/emphysema due to coal mine dust exposure and cigarette smoking based on claimant's chronic productive cough, evidence of airflow obstruction on pulmonary function testing, and a moderate reduction in claimant's single breath diffusing capacity for carbon monoxide. Director's Exhibit 16.

In contrast, the administrative law judge gave less weight to Dr. Dahhan's opinion, that industrial bronchitis resolves after a miner leaves the mines, because he found it to be in conflict with scientific evidence credited by the DOL.<sup>6</sup> Decision and Order at 27-28, *citing* 65 Fed. Reg. at 79,971. The administrative law judge indicated that it was "unclear" what medical literature Dr. Dahhan relied on to find that smoking can cause an eighty to ninety cubic centimeter (cc) decrease in FEV1 per year of smoking, given that the study referenced by Dr. Dahhan only indicated an average decrease of five ccs per pack year. Decision and Order at 29. The administrative law judge also found that Dr. Dahhan "ignored the corollary conclusion, alluded to in the study and clearly stated in the preamble, that the average decrease in FEV1 due to coal mine dust exposure does not represent the actual decrease in FEV1 experienced by the minority of miners who [suffer] significant impairment." *Id.* In addition, the administrative law judge determined that Dr. Dahhan's "comparison of the average annual FEV1 decrease due to smoking across 'susceptible smokers[,] with the average annual FEV1 decrease due to coal mine dust exposure across all miners[,] is not persuasive on its face." *Id.* The administrative law judge also stated that Dr. Dahhan did not explain how the comparison of these statistics supports his opinion. *Id.* Further, the administrative law judge indicated that Dr. Dahhan's opinion, that coal dust exposure cannot cause a significant decrease in FEV1, is contrary to the studies credited by the DOL and the definition of legal pneumoconiosis, which states that coal mine dust can cause significant obstructive impairment. *Id.*, *citing* 65 Fed. Reg. 79,937-45; 20 C.F.R. §718.201(a)(2).

Regarding Dr. Broudy's opinion, the administrative law judge initially determined that Dr. Broudy's opinion, that disabling respiratory impairments are extremely rare in non-smoking coal miners, is consistent with the view expressed by the DOL in the preamble to the revised regulations.<sup>7</sup> Decision and Order at 30, *citing* 65 Fed. Reg.

---

<sup>6</sup> In Dr. Dahhan's initial examination of claimant on September 6, 1991, he diagnosed mild chronic bronchitis and attributed claimant's mild obstructive defect, with no demonstrable reversibility after the administration of bronchodilators, entirely to claimant's smoking history. Director's Exhibit 1. Dr. Dahhan concluded that claimant did not have any evidence of a pulmonary disability due to coal dust exposure. *Id.* After an examination of claimant on March 2, 2007, Dr. Dahhan indicated that claimant's moderately severe, partially reversible, obstructive impairment was due solely to cigarette smoking, based on the significant response to the administration of bronchodilators, claimant's treatment with multiple bronchodilator agents, and the FEV1 loss observed. Employer's Exhibit 1. Dr. Dahhan also explained that, because claimant's coal dust exposure ceased in 1998, any industrial bronchitis that he might have developed is no longer present. Employer's Exhibit 4.

<sup>7</sup> Dr. Broudy diagnosed very severe chronic obstructive airways disease due solely to cigarette smoking and noted that after the administration of bronchodilators, claimant

79,940. However, the administrative law judge found Dr. Broudy's opinion, that severe obstructive impairment is rarely caused by coal workers' pneumoconiosis, to be contrary to the medical evidence credited by the DOL, which indicated that miners who do not smoke and smokers who are not exposed to coal dust have an equal risk of developing an obstructive impairment. Decision and Order at 30-31. In addition, the administrative law judge noted Dr. Broudy's statement, that individuals with a severe impairment due to coal dust exposure usually have progressive massive fibrosis or complicated pneumoconiosis, resulting in a primarily restrictive impairment with some obstruction. *Id.* at 31. The administrative law judge determined that, although Dr. Broudy did not exclude the possibility of an obstructive impairment due to coal dust exposure on this basis, he did rely on this statement, in part, in forming his opinion regarding the cause of claimant's impairment. *Id.* Further, the administrative law judge stated that Dr. Broudy did not cite any medical literature to support his conclusion and that it is contrary to the scientific studies credited by the DOL in the preamble to the revised regulations, which suggest that there is not a strong correlation between clinically significant emphysema and progressive massive fibrosis. *Id.*, citing 65 Fed. Reg. at 79,942.

The administrative law judge then indicated that Drs. Dahhan and Broudy reported that claimant's impairment was responsive to bronchodilators, which they characterized as inconsistent with the permanent nature of a coal dust-induced impairment. Decision and Order at 31. The administrative law judge stated that the medical literature credited by the DOL provides that a miner's obstructive impairment may be due to multiple causes. *Id.* In addition, the administrative law judge emphasized that claimant's 1991 pulmonary function study results, including one conducted by Dr. Dahhan, did not show a response to bronchodilators, and that all of claimant's more recent results, except one, continued to show a disabling residual impairment, even after the administration of bronchodilators. *Id.* Consequently, the administrative law judge found that Drs. Dahhan and Broudy did not adequately explain their opinions that coal dust exposure did not at least contribute to claimant's impairment and that it was appropriate, therefore, to give less weight to their opinions on this basis. *Id.*

---

still had a severe impairment. Director's Exhibit 19. Dr. Broudy opined that claimant's lung function suggested that he has large, emphysematous lungs, which are typically seen in cigarette smokers, and lacked the restrictive aspect generally seen with impairments due to coal dust exposure. Director's Exhibit 20. Dr. Broudy cited a study, by Lapp, Morgan and Zaldivar, in support of the assertion that disabling respiratory impairments in coal miners are "extremely rare" in the absence of cigarette smoking or some other non-occupationally-related disease. Employer's Exhibit 2. In addition, Dr. Broudy stated that individuals with severe impairment due to coal dust exposure usually have progressive massive fibrosis or complicated coal workers' pneumoconiosis resulting in a primarily restrictive disease with perhaps some obstruction. *Id.*

Based on these findings, the administrative law judge accorded Dr. Rasmussen's opinion greater weight than the opinions of Drs. Dahhan and Broudy. Decision and Order at 32. The administrative law judge indicated that, while he gave Dr. Baker's opinion less weight due to its remoteness in time, Dr. Baker's opinion also supported a finding that claimant's chronic obstructive pulmonary disease (COPD) was due to coal dust exposure and cigarette smoking. *Id.* Accordingly, the administrative law judge concluded that claimant's COPD arose out of coal mine employment and that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id.*

Addressing the issue of causation at 20 C.F.R. §718.204(c), the administrative law judge determined that all of the physicians who submitted reports in the subsequent claim opined that claimant's total disability was due to his COPD. Decision and Order at 32. Relying on his finding at 20 C.F.R. §718.202(a)(4), that coal dust exposure was a contributing cause of claimant's COPD, the administrative law judge concluded that claimant established that he is totally disabled due to pneumoconiosis arising out of his coal mine employment at 20 C.F.R. §718.204(c). *Id.*

## **II. Arguments on Appeal**

Employer asserts that the administrative law judge erred in relying on Dr. Rasmussen's opinion, that claimant's COPD/emphysema was due to coal dust exposure and cigarette smoking. Employer argues that Dr. Rasmussen's diagnosis of legal pneumoconiosis is undermined by his reliance on a positive x-ray interpretation, contrary to the administrative law judge's findings that this x-ray was negative for pneumoconiosis and that the x-ray evidence, as a whole, was insufficient to establish the existence of the disease. In addition, employer contends that Dr. Rasmussen's opinion is not reasoned because he did not specifically tie his diagnoses to the underlying medical documentation, including his physical examination of claimant and the results of the objective studies. Employer further states that Dr. Rasmussen's opinion does not exclude the possibility that claimant's respiratory impairment could be due entirely to cigarette smoking, or some other factor, since he specifically acknowledged that cigarette smoking and coal dust exposure could have the same effects. Therefore, employer maintains that Dr. Rasmussen's opinion is not reasoned, because the mere possibility of disease or disability causation is insufficient to constitute substantial evidence that coal dust is a causal factor in claimant's COPD/emphysema.

Contrary to employer's contention, the administrative law judge addressed the effect of Dr. Rasmussen's positive x-ray interpretation on his diagnosis of legal pneumoconiosis. The administrative law judge rationally determined that, "although I have found Dr. Rasmussen's diagnosis of clinical pneumoconiosis to be insufficiently reasoned, this finding does not necessarily result in a similar finding regarding his opinion that [claimant's] COPD was due, in part, to coal mine dust." Decision and Order

at 26; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494 (6th Cir. 2002); *see also Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994). In addition, the administrative law judge did not err in crediting Dr. Rasmussen's opinion as well-reasoned, despite his inability to state what portion of claimant's impairment was due to coal dust exposure and what portion was due to cigarette smoking. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that it is not necessary for a physician to apportion the causes of a miner's impairment as long as the physician credibly opines that the miner's impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Regarding the administrative law judge's weighing of the opinions of Drs. Dahhan and Broudy, employer argues that the administrative law judge erred in finding that these opinions are not reasoned and not documented and therefore entitled to less weight than the opinion of Dr. Rasmussen. Employer also asserts that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Broudy, based on information contained in the preamble to the revised regulations. Employer maintains that reliance on the preamble resulted in a violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that decisions be based on evidence in the record, and constitutes a shifting of the burden of proof. Additionally, employer contends that, in determining that the opinions of Drs. Dahhan and Broudy conflict with the revised regulations, the administrative law judge did not accurately characterize the physicians' conclusions. Further, employer asserts that the administrative law judge should have given more weight to the opinions of Drs. Dahhan and Broudy, in light of their superior credentials as Board-certified pulmonologists.<sup>8</sup> Employer also argues that the administrative law judge erred in failing to explain why he did not accord more weight to the opinions of Drs. Dahhan and Broudy, on the ground that they performed more recent examinations of claimant, given the administrative law judge's determination, with respect to the opinions of Drs. Myers and Baker, that a more recent physical examination can provide a rationale for giving additional weight to a physician's opinion.

We reject employer's contentions. As we held *supra*, the administrative law judge did not err in crediting Dr. Rasmussen's opinion as well-reasoned, despite the fact that he opined that the effects from coal dust exposure and cigarette smoking are indistinguishable. Slip op. at 10. With respect to Dr. Dahhan's opinion regarding the

---

<sup>8</sup> Dr. Rasmussen is Board-certified in internal medicine. Director's Exhibit 16.

significance of the decrease in claimant's FEV1, the administrative law judge rationally determined that it was entitled to less weight, because Dr. Dahhan did not explain the basis for his statement that claimant's cigarette smoking was sufficient to cause a loss of eighty to ninety ccs of FEV1, nor did he explain why this ruled out coal dust exposure as a contributing cause of claimant's obstructive impairment. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Clark*, 12 BLR at 1-155.

We also reject employer's assertion that it was error for the administrative law judge to rely on the preamble to the revised regulations in weighing the medical opinion evidence. The Board has held that the extent to which a medical opinion accords with accepted scientific evidence, as recognized by DOL in the preamble to the revised regulations, is a valid criterion for an administrative law judge to consider in weighing an opinion. *See J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117 (2009). Thus, the administrative law judge rationally determined that the studies cited by Drs. Dahhan and Broudy in support of their conclusion, that claimant's obstructive impairment was caused solely by cigarette smoking, were in conflict with the scientific evidence cited by the DOL in the preamble to the revised regulations.<sup>9</sup>

Further, contrary to employer's assertion, the administrative law judge did not indicate that Dr. Dahhan ruled out coal dust exposure as a potential cause of obstructive impairment in all cases, nor did he impermissibly shift the burden of proof to employer. Rather, the administrative law judge acted rationally in discrediting Dr. Dahhan's opinion, because he found that it did not contain an explanation of why claimant's respiratory impairment could not be related, in part, to coal dust exposure, particularly in light of the fact that Dr. Dahhan's examinations of claimant produced objective data indicating that claimant has retained a fixed impairment over time. Decision and Order at 31; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Clark*, 12 BLR at 1-155. Similarly, the administrative law judge acted within his discretion in discounting Dr. Broudy's opinion, as he attributed claimant's impairment solely to cigarette smoking without explaining why coal dust exposure could not have had a concurrent effect. *Id.*

---

<sup>9</sup> Dr. Dahhan cited studies showing that coal dust exposure may cause a loss of five to nine cubic centimeters (cc) of FEV1 per year of exposure, to support his assertion that claimant's coal mine employment could not account for the 2000 cc loss in his FEV1. Employer's Exhibit 4. Dr. Broudy prepared a supplemental report, in which he explained, based on the findings in a paper by Lapp, Morgan and Zaldivar, that disabling respiratory impairments in coal miners are "extremely rare" in the absence of cigarette smoking or some other non-occupationally-related disease. Employer's Exhibit 2.

We also reject employer's contention that the administrative law judge was required to assign greater weight to the opinions of Drs. Dahhan and Broudy, based on their qualifications. The administrative law judge rationally found that their opinions were entitled to little weight because they conflicted with the DOL's comments to the regulations and were not adequately explained. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). In addition, it was not irrational for the administrative law judge to give less weight to the medical opinions submitted with claimant's 1991 claim, due to their remoteness in time, without applying the same principle to Dr. Rasmussen's opinion, as the examinations by Drs. Dahhan and Broudy were approximately four months more recent than the examination by Dr. Rasmussen. *See Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163 (6th Cir. 1997); *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993); *Stewart v. Wampler Brothers Coal Co.*, 22 BLR. 1-80 (2000)(*en banc*).

Because the administrative law judge properly explained the bases for his credibility determinations, we affirm his decision to assign greater weight to Dr. Rasmussen's opinion and his findings that claimant has proved the existence of legal pneumoconiosis and total disability due to pneumoconiosis at 20 C.F.R. §§718.202(a)(4), 718.204(c). Thus, we affirm the award of benefits.<sup>10</sup>

---

<sup>10</sup> Because we have affirmed the award of benefits, we hold that application of the recent amendments to the Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See Black Lung Benefits Act*, 30 U.S.C. §§901-944 (2006), amended by Publ. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).

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