

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB Nos. 16-0182 BLA
and 16-0183 BLA

BETTY E. PULLEN)	
(Widow of GENE E. PULLEN))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 02/17/2017
)	
DONALDSON MINING COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Emily Goldberg-Kraft (Maia Fisher, Associate Solicitor of Labor; 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits (2010-BLA-05575 and 2013-BLA-06047) of Administrative Law Judge Scott R. Morris rendered on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case involves a miner's claim filed on July 29, 2009 and a survivor's claim filed on June 5, 2013.¹

The administrative law judge credited the miner with at least fourteen years and five months of coal mine employment, and found that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² Considering whether claimant could affirmatively establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits in the miner's claim, commencing in July 2009.

With regard to the survivor's claim, the administrative law judge noted that Section 422(l) of the Act, 30 U.S.C. §932(l), provides that a survivor of a miner who is determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits.

¹ Claimant is the widow of the miner, who died on September 10, 2010. Director's Exhibit 12. Claimant is pursuing the miner's claim on his behalf. Survivor's Director's Exhibit 2; Miner's Director's Exhibit 37.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is or was totally disabled due to pneumoconiosis in cases where a 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); *see* 20 C.F.R. §718.305.

On appeal, employer challenges the administrative law judge's award of benefits in both claims. Employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in determining that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) in the miner's claim. Employer further maintains that the administrative law judge's errors on the issue of legal pneumoconiosis necessitate vacating his finding of disability causation pursuant to 20 C.F.R. §718.204(c) and the award of derivative benefits in the survivor's claim.³ The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, arguing that, contrary to employer's contention, the preamble to the 2001 regulations does not state that impairments due to legal pneumoconiosis are static. Specifically, the Director maintains that employer fails to cite to specific language in the preamble that supports this proposition. Claimant has not responded to employer's appeal.⁴

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.⁵ 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).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. 30 U.S.C. §901; 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 an award of benefits. See *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).

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).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). See *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

⁵ The record indicates that the miner's last coal mine employment was in West Virginia. Miner's Director's Exhibit 3. 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).

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).⁶ The administrative law judge considered the medical opinions of Drs. Rasmussen, Gaziano, Castle, and Basheda.⁷ Dr. Rasmussen diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to coal dust exposure and cigarette smoking based on his examination of the miner. 20 C.F.R. §718.201(a)(2); Miner's Director's Exhibit 14. Dr. Gaziano also diagnosed legal pneumoconiosis in the form of COPD/emphysema due to coal dust exposure and cigarette smoking based on his review of the medical evidence. Miner's Claimant's Exhibit 2. Conversely, Dr. Castle diagnosed disabling COPD and bullous emphysema, but opined that the miner's disease was due to cigarette smoking, not coal dust exposure. Miner's Employer's Exhibits 1, 7, 10, 12. Finally, Dr. Basheda diagnosed obstructive airway disease/bullous emphysema due solely to cigarette smoking, not coal dust exposure. Miner's Employer's Exhibits 8, 9, 11.

The administrative law judge concluded that the opinions of Drs. Rasmussen and Gaziano that the miner's COPD/emphysema was due, in part, to coal dust exposure were entitled to the most weight because they were well-documented, well-reasoned, and in accordance with the scientific and epidemiological evidence underlying the controlling regulations, as set out in the preamble to the 2001 regulations. Decision and Order at 32, *citing J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). In contrast, the administrative law judge discredited the opinions of Drs. Castle and Basheda, in part, because he found them to be less-documented, less reasoned, and inconsistent with "the scientific underpinnings of the [p]reamble." Decision and Order at 32-33. The

⁶ The administrative law judge found the weight of the medical evidence, including the medical opinions of Drs. Rasmussen, Gaziano, Castle, and Basheda, insufficient to establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1), (4); Decision and Order at 16, 30. This finding is affirmed as unchallenged by the parties on appeal. *See Skrack*, 6 BLR at 1-711.

⁷ The administrative law judge found that the qualifications of each of these physicians are comparable. Specifically, the administrative law judge found that Drs. Castle, Basheda, and Gaziano are each Board-certified in internal medicine, with a subspecialty in pulmonary diseases and are also certified as B readers. Decision and Order at 29. The administrative law judge further found that Dr. Rasmussen, while Board-certified in internal medicine and a certified B reader, is not Board-certified in pulmonary diseases. *Id.* However, based on his professional background and numerous publications and awards, the administrative law judge found that Dr. Rasmussen was also highly-qualified to render an opinion in this case. *Id.*

administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) and misapplied the preamble to the 2001 regulations in evaluating the medical opinion evidence. With respect to Drs. Castle and Basheda, employer contends that the administrative law judge failed to provide valid reasons for discrediting their opinions. Employer's Brief at 6-15. We disagree.

The administrative law judge discredited the opinions of Drs. Castle and Basheda that the miner's COPD/emphysema was due solely to smoking because he found that neither physician adequately explained how he eliminated the miner's coal dust exposure as a source of the miner's COPD/emphysema. Decision and Order at 31-33. Specifically, the administrative law judge noted that Drs. Castle and Basheda based their opinions that the miner had emphysema attributable to smoking but not coal dust exposure, in part, on radiographic evidence of bullous emphysema, a type of emphysema they associated with smoking. Decision and Order at 32. The administrative law judge accurately noted, however, that Drs. Castle and Basheda also reviewed Dr. Scott's interpretation of the December 14, 2009 CT scan, which additionally identified the presence of centrilobular emphysema, "a form of emphysema recognized by the [p]reamble as being related to coal mine dust exposure." Decision and Order at 31-32 & n.25; *see* 65 Fed. Reg. 79,920, 79,941-42 (Dec. 20, 2000). Thus, the administrative law judge permissibly determined that neither physician adequately explained how he eliminated the miner's coal dust exposure as a source of the miner's COPD/emphysema in view of the record evidence and the scientific findings credited in the preamble. Decision and Order at 31-33; *see Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012).

Further, the administrative law judge acknowledged that Drs. Castle and Basheda based their opinions, in part, on the improvement in the values obtained between Dr. Rasmussen's October 21, 2009 pulmonary function study and the February 8, 2010 pulmonary function study administered by Dr. Crisalli, and on the reversibility of claimant's impairment with bronchodilator treatment, stating that such an improvement is consistent with a tobacco-induced airway obstruction and not pneumoconiosis. Decision and Order at 31; Miner's Director's Exhibits 15, 31. However, the administrative law judge noted that both tests displayed values that were qualifying for total disability even after bronchodilator use. Decision and Order at 33 & n.26. In light of this factor, the administrative law judge concluded that Drs. Castle and Basheda did not adequately explain why the miner's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of his remaining obstructive impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett*

Collieries, Inc. v. Barrett, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 33 & n.26. The administrative law judge, therefore, permissibly accorded less weight to the opinions of Drs. Castle and Basheda.⁸

Employer further argues that, even if the opinions of Drs. Castle and Basheda are accorded no weight, the administrative law judge erred in finding that the opinions of Drs. Rasmussen and Gaziano were sufficiently reasoned. Specifically, employer contends that the opinions of Drs. Rasmussen and Gaziano were based on generalities and not the facts of this case, and are therefore insufficient to carry claimant's burden of proof to establish legal pneumoconiosis. Employer's Brief at 16-17. We disagree.

In crediting Dr. Rasmussen's determination that the miner suffered from legal pneumoconiosis in the form of COPD/emphysema, the administrative law judge noted that Dr. Rasmussen examined the miner and based his opinion on a detailed account of the miner's symptoms, medical history, smoking history, observations, pulmonary function testing, and blood gas study testing. Decision and Order at 30; Miner's Director's Exhibit 15. The administrative law judge further noted that Dr. Rasmussen explained that both cigarette smoke and coal dust exposure are known to cause COPD/emphysema and that the chronic lung disease caused by these agents is identical, *i.e.*, both can cause all types of emphysema except for scar emphysema, which is dust-induced. *Id.* Dr. Rasmussen concluded that it was impossible to distinguish the effects of the miner's cigarette smoking from the effects of his coal dust exposure, and that both exposures must be considered significant co-contributing factors. *Id.*

With regard to Dr. Gaziano's diagnosis of legal pneumoconiosis, the administrative law judge found that the physician based his conclusion on a detailed review of the medical evidence of record, including Dr. Rasmussen's examination report, the objective testing, hospitalization and treatment records, and the consulting opinions of Drs. Castle and Basheda. Decision and Order at 31-32; Miner's Claimant's Exhibit 2. The administrative law judge noted that, in diagnosing legal pneumoconiosis, Dr. Gaziano cited to medical literature confirming that both smoking and coal dust exposure cause COPD/emphysema, and it was his opinion that both smoking and coal dust exposure were "contributory to [the miner's] chronic lung disease." Decision and Order at 27-28; Miner's Claimant's Exhibit 2. The administrative law judge also acknowledged Dr. Gaziano's opinion that the improvement between Dr. Rasmussen's pulmonary

⁸ Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Castle and Basheda, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

function test results and the results obtained by Dr. Crisalli four months later represented a bronchitic, reversible component of the miner's legal pneumoconiosis. *Id.*

The determination of whether a medical opinion is sufficiently reasoned is a credibility determination for the administrative law judge to make. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). The administrative law judge's decision reflects that he considered the quality of the reasoning of Drs. Rasmussen and Gaziano in light of the objective evidence of record, and explained why he credited their conclusions that the miner's disabling COPD/emphysema was due, in part, to coal dust exposure. Substantial evidence supports the administrative law judge's determinations. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997) ("the administrative law judge should consider the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudices."); Decision and Order at 32.

The administrative law judge also permissibly found that the opinions of Drs. Rasmussen and Gaziano were supported by the scientific findings credited by DOL in the preamble to the 2001 regulations that smokers who are exposed to coal mine dust have an additive risk for developing significant obstruction and that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. Decision and Order at 32; *see* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Consequently, contrary to employer's contention, the administrative law judge permissibly found that the opinions of Drs. Rasmussen and Gaziano are sufficient to establish legal pneumoconiosis.

As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁹ We also affirm, as supported by substantial evidence, the administrative law judge's finding that all of the evidence of record, when weighed together, established the existence of legal

⁹ Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found that he was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 36-37.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 36; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer next contends that the administrative law judge's errors in finding legal pneumoconiosis established affected his findings on the issue of disability causation, requiring the Board to vacate his finding that claimant established disability causation pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 18.

In light of our decision to affirm the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a), we also affirm the administrative law judge's finding that claimant established disability causation pursuant to Section 718.204(c), as employer has not raised any specific allegation of error with regard to this issue.¹⁰ *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *see also Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984). Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

Survivor's Claim

Employer contends that, in light of its challenge to the miner's award of benefits and the errors alleged in the miner's claim, claimant is not entitled to a derivative award of benefits in her survivor's claim. Thus, employer urges the Board to vacate the award of survivor's benefits. Employer's Brief at 18.

The administrative law judge correctly determined that claimant meets the prerequisites for application of Section 932(l), as: she filed her survivor's claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. Decision and Order at 43. Based on our affirmance of the award in the miner's claim, claimant has met all of the criteria. Therefore, claimant has demonstrated her automatic entitlement to benefits under Section 932(l). *See Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

¹⁰ The administrative law judge rationally discounted the disability causation opinions of Drs. Castle and Basheda because the physicians did not diagnose pneumoconiosis, contrary to the administrative law judge's finding on this issue. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 42.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge