

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB Nos. 19-0062 BLA
and 19-0062 BLA-A

LAVODUS S. MARCUM)	
(o/b/o the Estate of DENNIS MARCUM))	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
ABBS RESOURCES, INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	DATE ISSUED: 02/18/2020
COMPENSATION FUND)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Andrea Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals and claimant¹ cross-appeals the Decision and Order on Remand Awarding Benefits (2016-BLA-05069) of Administrative Law Judge Drew A. Swank rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on July 28, 2014,² and is before the Board for the second time.

In his initial Decision and Order, the administrative law judge found the miner had fourteen years of coal mine employment and was totally disabled at 20 C.F.R. §718.204(b), thus establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309. He further found the miner was totally disabled due to clinical pneumoconiosis at 20 C.F.R. §718.204(b), (c) and awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings that the miner had fourteen years of coal mine employment, and the new evidence established total disability and thus a change in an applicable condition of entitlement.³ *Marcum v. Abbs Resources, Inc.*, BRB No. 17-0355 BLA, slip op. at 3 n.5 (Apr. 4, 2018) (unpub.). The Board also affirmed his finding that the x-ray evidence established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), but vacated his finding the miner established clinical pneumoconiosis under 20 C.F.R. §718.202(a) as he failed to render findings at 20 C.F.R. §718.202(a)(2)-(4) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11 (4th Cir. 2000). *Marcum*, BRB No. 17-0355 BLA, slip op. at 4, 5. Further, the Board vacated the administrative law judge's finding the miner's totally disabling

¹ Claimant is the widow of the miner, who died on January 11, 2017 while his subsequent claim was pending. She is pursuing the miner's claim on behalf of his estate. Decision and Order on Remand at 1 n.1.

² This is the miner's sixth claim. On December 2, 2005, the district director denied his most recent prior claim, filed on April 11, 2005, because the evidence did not establish total respiratory disability. Director's Exhibit 5. The miner did not take any further action until filing his current claim. Director's Exhibit 7.

³ The Board also affirmed the administrative law judge's determination that the miner did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act because he had less than fifteen years of coal mine employment. 30 U.S.C. §921(c)(4); *Marcum v. Abbs Resources, Inc.*, BRB No. 17-0355 BLA, slip op. at 2 n.3 (Apr. 4, 2018) (unpub.).

respiratory impairment was due to pneumoconiosis. *Marcum*, BRB No. 17-0355 BLA, slip op. at 5-6.

The Board instructed the administrative law judge to determine on remand whether the miner had clinical and legal pneumoconiosis based on his consideration of all the relevant evidence at 20 C.F.R. §718.202(a)(1)-(4). *Marcum*, BRB No. 17-0355 BLA, slip op. at 6. If reached, the Board instructed him to determine whether the miner's totally disabling respiratory impairment was due to pneumoconiosis. *Id.*

On remand, the administrative law judge found the miner had clinical and legal pneumoconiosis arising out of coal mine employment, and that his totally disabling respiratory impairment was due to pneumoconiosis and awarded benefits.

In the present appeal, employer challenges those findings. Claimant responds in support of the award of benefits. Employer filed a reply brief, reiterating its contentions. On cross-appeal, claimant challenges the administrative law judge's decision to discredit Dr. Cohen's diagnosis of clinical pneumoconiosis. Employer responds, urging the Board to reject claimant's argument. The Director, Office of Workers' Compensation Programs, has not filed a response brief in either appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order on Remand Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 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).

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, claimant must establish the existence of 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. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner's last coal mine employment occurred in West Virginia. See *Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 8, 10.

Clinical Pneumoconiosis

The administrative law judge considered the opinions of Drs. Cohen and Rasmussen that the miner had clinical pneumoconiosis⁵ and the contrary opinions of Drs. Zaldivar and Castle. Decision and Order on Remand at 8-13; Director's Exhibits 17, 34; Claimant's Exhibit 2 at 8-9, 17-18; Employer's Exhibits 3, 9. He found the opinions of Drs. Cohen, Zaldivar and Castle not well-documented or reasoned. Decision and Order on Remand at 10-13. In contrast he found Dr. Rasmussen's opinion well-documented and reasoned, thus supporting a finding the miner had clinical pneumoconiosis. *Id.* at 9, 13.

We reject employer's arguments that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle and crediting Dr. Rasmussen's opinion. Employer's Brief at 6. Dr. Zaldivar stated that "there is no evidence to justify a diagnosis of clinical pneumoconiosis" because the abnormalities on the miner's x-rays are inconsistent with clinical pneumoconiosis, but consistent with pulmonary fibrosis unrelated to coal mine dust exposure. Director's Exhibit 34. Similarly, Dr. Castle stated that the miner "does not have medical (clinical) pneumoconiosis because the chest x-ray does not show evidence of coal workers' pneumoconiosis." Employer's Exhibit 3. Contrary to employer's assertion, the administrative law judge permissibly rejected their opinions because they based them on negative interpretations of x-rays, inconsistent with his finding that the x-rays established the existence of the disease. See *Furgerson v. Jericor Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc) (the reliability of a physician's opinion may be "called into question" when the diagnostic tests upon which the physician based his diagnosis have been undermined); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order on Remand at 11, 13; Employer's Brief at 5. Conversely, the administrative law judge noted Dr. Rasmussen's diagnosis of clinical pneumoconiosis was based on a review of the miner's work and medical histories, a physical examination, pulmonary function testing, and a positive x-ray interpretation.⁶ Decision and Order on Remand at 8-9; Employer's Brief at 6-7; Director's Exhibit 17. The administrative law

⁵ Clinical pneumoconiosis consists of "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. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

⁶ Dr. Rasmussen found the x-ray evidence established clinical pneumoconiosis "consistent with that caused by coal mine dust exposure." Director's Exhibit 17.

judge therefore permissibly found Dr. Rasmussen’s opinion well-reasoned and documented, and entitled to greater weight than the opinions of Drs. Zaldivar and Castle. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Remand at 13.

As the trier-of-fact, the administrative law judge’s function is to weigh the evidence, draw appropriate inferences, and determine the credibility of the evidence. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017). The Board cannot reweigh the evidence or substitute its inferences. *See Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because substantial evidence supports the administrative law judge’s credibility determinations, we affirm his finding that the medical opinion evidence establishes clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4).⁷

Legal Pneumoconiosis

To establish legal pneumoconiosis,⁸ claimant must prove the miner had a chronic pulmonary disease or respiratory or pulmonary impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b). The administrative law judge considered the opinions of Drs. Rasmussen, Cohen, Zaldivar and Castle. Dr. Rasmussen opined the miner had legal pneumoconiosis in the form of a restrictive interstitial lung disease related to coal dust exposure. Director’s Exhibit 17. Dr. Cohen similarly opined the miner had legal pneumoconiosis in the form of a severe restrictive impairment related to coal dust exposure. Claimant’s Exhibit 2 at 32-33. In contrast, Drs. Zaldivar and Castle opined the miner did not have legal pneumoconiosis, but had interstitial pulmonary fibrosis unrelated to coal dust exposure. Director’s Exhibit 34; Employer’s Exhibits 3, 8, 9. The administrative law judge found the opinions of Drs. Rasmussen and Cohen well-documented and reasoned. *Id.* at 9, 10. He further found the opinions of Drs. Zaldivar and Castle well-documented, but unpersuasive. Decision and Order on Remand at 11-13. Thus he determined the medical opinions establish legal pneumoconiosis. *Id.* at 13.

⁷ In light of our affirmation of the administrative law judge’s finding that the evidence establishes the miner had clinical pneumoconiosis, we need not address claimant’s contention on cross-appeal that the administrative law judge erred in discrediting Dr. Cohen’s diagnosis of clinical pneumoconiosis.

⁸ 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).

We reject employer's argument the administrative law judge erred in crediting Dr. Rasmussen's opinion. Employer's Brief at 20. The administrative law judge permissibly determined that Dr. Rasmussen's opinion is well-documented because he relied on pulmonary function and blood gas testing, physical symptoms, and coal mine employment and smoking histories. Decision and Order on Remand at 9. He also noted that Dr. Rasmussen considered the possibility of idiopathic pulmonary fibrosis but persuasively explained why he instead concluded that coal dust exposure significantly contributed to the miner's lung disease. *Id.* Specifically, Dr. Rasmussen opined that retained coal mine dust can continue to cause inflammatory changes in the lungs of susceptible individuals indefinitely following termination of coal mine dust exposure and can lead to interstitial fibrotic changes. Director's Exhibit 17. Noting that the miner had been symptomatic for many years, Dr. Rasmussen explained it was more reasonable to conclude the miner's coal mine dust exposure was a significant factor contributing to his disabling lung disease. *Id.* Because Dr. Rasmussen explained his opinion in light of the miner's occupational history and symptoms, the administrative law judge permissibly found his opinion well-reasoned. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Thus we reject employer's assertion that Dr. Rasmussen's opinion is insufficient to establish the existence of legal pneumoconiosis.

We also reject employer's contention that the administrative law judge erred in crediting Dr. Cohen's opinion because, it asserts, his diagnosis of legal pneumoconiosis is "mixed" with his discredited diagnosis of clinical pneumoconiosis. Employer's Brief at 10-12. The administrative law judge properly held that a finding that a physician's opinion is not well-reasoned on clinical pneumoconiosis does not necessarily mean the opinion cannot be credited on the separate issue of legal pneumoconiosis. *See Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986); Decision and Order on Remand at 10. Instead, the administrative law judge examined the validity of the physicians' reasoning on each element of entitlement in light of the studies conducted and the underlying bases for their conclusions, as is required. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. He noted Dr. Cohen's diagnosis of legal pneumoconiosis was based on the miner's objective testing, occupational history, smoking history, medical history and "multiple" relevant factors. *Id.* He also noted that Dr. Cohen considered whether the miner's interstitial process was idiopathic or caused by the drug Amiodarone, but explained why he instead concluded that coal dust exposure caused the miner's restrictive impairment. Decision and Order on Remand at 10; Claimant's Exhibit 2 at 20-22, 32-33. Dr. Cohen testified, "[i]f he had a 2005 x-ray that shows changes, then that means that it's not that rapid, and I would speak against UIP [usual interstitial pneumonitis] being the only cause[,]]" and concluded "it's difficult to rule out significant contribution from his coal mine dust exposure." Claimant's Exhibit 2 at 29-30. Rather, he opined that coal dust exposure was a substantially contributing factor of the miner's severe restrictive diffusion impairment. *Id.* at 20-22, 32-33. Contrary to employer's assertion, the administrative law judge permissibly found Dr.

Cohen's opinion that the miner had legal pneumoconiosis well-reasoned. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order on Remand at 10; Employer's Brief at 10-12.

We further reject employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle on legal pneumoconiosis. They concluded the miner did not have legal pneumoconiosis in part because his symptoms were sudden and abrupt. The administrative law judge permissibly found, however, that Dr. Rasmussen's observation that the miner had been symptomatic for many years, and Dr. Ranavaya's positive reading of a 2005 x-ray, supported the conclusion the miner's symptoms were not as abrupt as Drs. Zaldivar and Castle described. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Underwood*, 105 F.3d at 949 (4th Cir. 1997); Decision and Order on Remand at 11-12. Further, the administrative law judge permissibly found Dr. Zaldivar did not adequately explain his conclusion that coal dust exposure did not contribute to the miner's pulmonary fibrosis in light of Dr. Zaldivar's assessment that the miner needed another biopsy to determine the type of fibrosis he had. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Underwood*, 105 F.3d at 949 (4th Cir. 1997); Decision and Order on Remand at 11-12; Employer's Exhibit 9 at 33, 35, 37, 44. Because substantial evidence supports the administrative law judge's bases for discrediting the opinions of Drs. Zaldivar and Castle, we affirm them.⁹ *See Compton*, 211 F.3d at 207-08. We therefore affirm the administrative law judge's finding that the miner had legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.201(b).

We further affirm, as supported by substantial evidence, the administrative law judge's determination that all of the evidence of record, when weighed together, establishes both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a).¹⁰ *See Compton*, 211 F.3d at 209; Decision and Order on Remand at 15.

⁹ Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Zaldivar and Castle, any error in according them less weight for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to their opinions.

¹⁰ In addition to the x-rays and medical opinions, the administrative law judge considered whether the biopsy, treatment records and computed tomography (CT) scan evidence established pneumoconiosis. He found that the biopsy evidence "as a whole neither supports nor weighs against a finding of clinical pneumoconiosis." Decision and Order on Remand at 7. He also found the treatment records insufficient to establish the presence or absence of clinical or legal pneumoconiosis. *Id.* at 13-14. Further, he found

We further affirm as unchallenged the administrative law judge’s determination that the miner’s pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203; *see Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 15-16.

Total Disability Causation

Employer next argues the administrative law judge erred in finding the miner’s total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204(c). Employer’s contention lacks merit.

To establish this element, claimant must prove that pneumoconiosis was a “substantially contributing cause” of the miner’s totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Drs. Zaldivar and Castle opined the miner did not have clinical or legal pneumoconiosis and smoking caused his disabling respiratory impairment. Director’s Exhibit 34; Employer’s Exhibit 3. Having determined claimant established the existence of clinical and legal pneumoconiosis, the administrative law judge rationally found their opinions unpersuasive. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (a doctor’s opinion as to causation may not be credited unless there are “specific and persuasive reasons” for concluding the doctor’s view on causation is independent of the doctor’s mistaken belief that the miner did not have pneumoconiosis); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order on Remand at 17. In contrast, for the same reasons he credited the opinions of Drs. Rasmussen and Cohen on legal pneumoconiosis, the administrative law judge permissibly credited their opinions regarding the etiology of the miner’s disabling respiratory impairment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Consequently, we affirm the administrative law judge’s determination that claimant established total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990) (claimant must prove by a preponderance of the evidence that pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order on Remand at 17-18. We therefore affirm the administrative law judge’s award of benefits.

that the CT scan evidence does not support a finding of clinical pneumoconiosis. *Id.* at 14-15.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge