

U.S. Department of Labor

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



BRB No. 15-0139 BLA

ADAM J. HOLBROOK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ANR COAL COMPANY, LLC F/K/A)	DATE ISSUED: 01/29/2016
ENTERPRISE COAL COMPANY)	
)	
and)	
)	
COASTAL COAL COMPANY, LLC)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	
)	

Appeal of the Decision and Order Awarding Benefits in a Modification of a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Modification of a Subsequent Claim (2011-BLA-05865) of Administrative Law Judge Larry S. Merck (the administrative law judge). The subsequent claim at issue was filed on October 7, 2002, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).¹ In his Decision and Order, dated December 16, 2014, the administrative law judge determined that claimant established sixteen years of coal mine employment based on the stipulation of the parties.² The administrative law judge also found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. The administrative law judge

¹ Claimant filed claims for benefits on September 17, 1985, January 30, 1990, October 28, 1994, and January 21, 1999. Director's Exhibits 1-4. All of these claims were ultimately denied because claimant did not establish any element of entitlement. *Id.* Claimant filed his current subsequent claim on October 7, 2002 and Administrative Law Judge William S. Colwell issued a Decision and Order Awarding Benefits on October 31, 2006. Director's Exhibits 6, 55. Pursuant to employer's appeal, the Board affirmed in part, and vacated in part, the award of benefits and remanded the case to Judge Colwell for reconsideration of the issues of the existence of pneumoconiosis, total disability and total disability causation. Director's Exhibits 57, 68; *A.J.H. [Holbrook] v. Enterprise Coal Co.*, BRB No. 07-0230 BLA (Nov. 29, 2007) (unpub.) (Hall, J., concurring and dissenting). On February 25, 2009, Judge Colwell denied benefits, finding that claimant established clinical pneumoconiosis and total disability but did not establish total disability causation. Director's Exhibit 73. Claimant appealed and on January 19, 2010, the Board affirmed the denial of benefits. Director's Exhibits 75, 85; *Holbrook v. Enterprise Coal Co.*, BRB No. 09-0483 BLA (Jan. 19, 2010). On October 26, 2010, claimant requested modification. Director's Exhibits 87-88.

² While claimant's request for modification was pending before the district director, employer filed a Motion to be Relieved of Stipulation, seeking to withdraw its stipulation to sixteen years of coal mine employment due to an intervening change in law, i.e., the amendments to Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012). Director's Exhibit 107. The district director denied employer's motion. Director's Exhibit 109. The administrative law judge also ruled on employer's motion, and denied it on the basis that the presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) is inapplicable because the relevant claim was filed before January 1, 2005. Decision and Order at 19-20 n.13; 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(a).

further concluded that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and a change in conditions at 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues, in its brief and reply brief, that the administrative law judge erred in finding that claimant established total disability causation at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.

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.³ 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 this case, employer explicitly states that the only issue on appeal is whether the administrative law judge properly found that claimant established that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). Employer's Brief in Support of Petition for Review at 6. Accordingly, we affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.201(a)(1), 718.203(b), and total disability at 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. §718.204(c)(1), a miner is considered totally disabled due to pneumoconiosis when pneumoconiosis is a "substantially contributing cause" of the miner's disability. To be deemed a "substantially contributing cause," pneumoconiosis must have "a material adverse effect on the miner's respiratory or pulmonary condition," or "materially worsen[] a totally disabling respiratory or pulmonary impairment which is caused by a disease or condition unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i).

In this case, the administrative law judge initially determined that Judge Colwell did not err in finding, in his Decision and Order on Remand Denying Benefits issued on

³ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 8. Accordingly, 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).

February 25, 2009, that claimant failed to establish that his totally disabling respiratory impairment is due to pneumoconiosis. Decision and Order at 34. However, the administrative law judge determined that Dr. Baker's newly submitted diagnosis of total respiratory disability due to legal pneumoconiosis and cigarette smoking is well-reasoned and well-documented and is entitled to "full probative weight." *Id.* at 35. The administrative law judge further found that Dr. Jarboe's newly submitted opinion, that claimant's respiratory impairment is unrelated to coal dust exposure, was not well-reasoned because the physician based his conclusions on several premises that conflict with the scientific views accepted by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. *Id.* at 35-36. When considering all of the record evidence, the administrative law judge gave more weight to Dr. Baker's findings, which he determined were "substantially more recent than the evidence considered by [Judge] Colwell." *Id.* at 36. Consequently, the administrative law judge concluded that claimant proved that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 36-37.

Employer argues that the administrative law judge erred in failing to resolve the conflict in the record concerning claimant's smoking history, before determining the credibility of the medical opinion evidence on the issue of total disability causation. Employer contends that, due to this omission, the administrative law judge "effectively and improperly shifted the burden of proof to employer and gave Dr. Baker a free pass to offer a conclusory opinion that both smoking and dust exposure must have played some role in causing disability." Employer's Brief in Support of Petition for Review at 8. Employer also asserts that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a), by failing to explain why he found Dr. Baker's opinion to be documented and reasoned when he likely relied on an erroneous smoking history. Employer also maintains that, contrary to the administrative law judge's determination, Dr. Baker did not discuss how the objective studies support his opinion, but rather offered "vague generalities." *Id.* at 13. Employer argues that the administrative law judge further erred in discrediting Dr. Jarboe's opinion, which "is at least as well-reasoned as Dr. Baker's opinion." *Id.* at 14. Finally, employer alleges that the administrative law judge selectively considered the factors Dr. Jarboe relied on in excluding coal dust exposure as a cause of claimant's impairment. For the following reasons, we reject employer's contentions.

Although employer correctly asserts that the administrative law judge did not make a specific finding concerning the length of claimant's smoking history, remand is not required on this basis. The administrative law judge discussed the various reported smoking histories and reasonably concluded that Drs. Baker and Jarboe agreed that

claimant has a significant smoking history that contributed to his respiratory impairment.⁴ See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 26-28, 35.

Additionally, there is no merit in employer's assertion that the administrative law judge improperly shifted the burden of proof to employer on the issue of disability causation. Rather, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker's opinion is entitled to "full probative weight." Decision and Order at 35. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the reviewing authority is required to defer to the administrative law judge's assessment of a physician's credibility, unless it is plainly erroneous. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In this case, the administrative law judge rationally determined that Dr. Baker fully set forth his findings, based on his examination of claimant and the results of his objective testing, and stated that both coal dust and smoking contributed to claimant's impairment, as the effects from the two are additive.⁵ See *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 34-35; Director's Exhibit 88; Claimant's Exhibit 3A.

⁴ The administrative law judge adopted the findings in Judge Colwell's October 31, 2006 Decision and Order Awarding Benefits. Decision and Order at 20. In that Decision and Order, Judge Colwell determined that, "while the Claimant clearly provided varying smoking histories to the physicians listed below, all of these doctors considered long and extensive smoking histories. Therefore, despite the inconsistent reports, I do not find that those differences render any of the reports unreasoned or poorly documented." 2006 Decision and Order Awarding Benefits at 19. In addition, the administrative law judge noted that Dr. Baker considered a "significant smoking history" when evaluating claimant. Decision and Order at 35.

⁵ In Dr. Baker's report of his examination of claimant on August 7, 2010, he diagnosed clinical pneumoconiosis, legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD), chronic bronchitis, and a totally disabling obstructive impairment. Director's Exhibit 88. He indicated that the miner's clinical pneumoconiosis, "COPD with a moderate obstructive defect, mild resting arterial hypoxemia and chronic bronchitis all have a material adverse effect on his respiratory condition and contributes [sic] to his total[ly] disabling impairment." *Id.* Dr. Baker also determined that the miner's respiratory impairment "has been significantly contributed to and substantially aggravated by his coal dust exposure from his coal mine employment." *Id.* In a subsequent letter, Dr. Baker maintained that claimant's totally disabling impairment was attributable to both coal dust exposure and smoking, based on the

Furthermore, contrary to employer's contention that the administrative law judge should have discredited Dr. Baker's opinion as conclusory or speculative, the administrative law judge permissibly found that Dr. Baker's identification of both smoking and coal dust exposure as causal factors in claimant's respiratory impairment did not make his opinion unreasoned. The Sixth Circuit previously held, in affirming an administrative law judge's crediting of a similar opinion by Dr. Baker, that it is not necessary for a physician to apportion the causes of total disability, as long as pneumoconiosis was a substantial cause of the disability.⁶ See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Therefore, we affirm the administrative law judge's determination that Dr. Baker's opinion on the issue of total disability causation is well-reasoned and well-documented, and entitled to "full probative weight." Decision and Order at 35; see *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.

In addition, contrary to employer's allegations of error, the administrative law judge's decision to discredit Dr. Jarboe's opinion, that claimant's disabling respiratory

medical literature reporting that coal dust exposure can cause an obstructive defect and that "coal dust exposure and cigarette smoking together may be either synergistic or additive." Claimant's Exhibit 3A.

⁶ In *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007), the court considered whether the administrative law judge erred in crediting Dr. Baker's opinion on the issues of the existence of legal pneumoconiosis and total disability causation. Dr. Baker stated that coal dust exposure "probably contributes to some extent in an undefinable proportion" to the miner's obstructive lung disease and impairment. See *Barrett*, 478 F. 3d at 356, 23 BLR at 2-483. The administrative law judge determined that, although Dr. Baker's opinion was equivocal, the equivocality related to "the extent to which coal dust exposure contributed rather than whether coal dust contributed to [the miner's] respiratory impairments." *Id.* In contrast, the administrative law judge discredited the opinion of Dr. Dahhan, that the miner did not have legal pneumoconiosis and was not totally disabled by a disease related to coal dust exposure, because Dr. Dahhan did not adequately explain his conclusions and did not compare the exertional requirements of the miner's usual coal mine work to his functional limitations. *Id.* The Sixth Circuit affirmed the administrative law judge's weighing of the opinions of Drs. Baker and Dahhan, and the award of benefits, stating "we find the [administrative law judge] correctly applied the law, and that his factual findings are supported by substantial evidence. He adequately explained his reasons for rejecting Dr. Dahhan's medical report and explained why he found Dr. Baker's report to be well-reasoned." *Barrett*, 478 F.3d at 357, 23 BLR at 2-483.

impairment is not related to coal dust exposure, is rational and supported by substantial evidence. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Jarboe did not adequately explain why the “striking reversibility of function after bronchodilating agents” excluded pneumoconiosis as a cause of claimant’s disabling respiratory impairment, when the impairment remained after the administration of bronchodilators.⁷ See *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Decision and Order at 35; Director’s Exhibit 91; Employer’s Exhibit 1A. The administrative law judge also permissibly discredited Dr. Jarboe’s opinion because his view, that the absence of coal dust exposure for the past fifteen years weighs against a determination that claimant’s chronic bronchitis is related to coal dust exposure, is inconsistent with the medical science accepted by the Department of Labor (DOL) in the preamble to the 2001 revised regulations, and the revised definition of pneumoconiosis. 20 C.F.R. §718.201(c) (pneumoconiosis “is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure”); 65 Fed. Reg. 79,971 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-03, 25 BLR 2-203, 210-12 (6th Cir. 2012); Decision and Order at 36; Employer’s Exhibit 1A. Finally, the administrative law judge rationally found that Dr. Jarboe’s statement, that the significant reduction seen in claimant’s FEV1/FVC ratio is characteristic of obstruction due solely to smoking and/or asthma, conflicts with the DOL’s recognition of the prevailing scientific view that coal mine dust can cause clinically significant obstructive disease, as demonstrated by reductions in the FEV1/FVC ratio. 65 Fed. Reg. 79,943 (Dec. 20, 2000); see *Central Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 36.

Thus, we affirm the administrative law judge’s finding that Dr. Jarboe’s opinion, that pneumoconiosis played no role in claimant’s totally disabling respiratory impairment, is outweighed by Dr. Baker’s opinion identifying legal pneumoconiosis as having a “material adverse effect” on claimant’s respiratory condition. Director’s Exhibit 88. We further affirm, therefore, the administrative law judge’s finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).⁸

⁷ In the medical report that employer submitted in response to claimant’s modification request, Dr. Jarboe found that a December 2, 2010 pulmonary function study was qualifying both before and after the administration of bronchodilators. Director’s Exhibit 91.

⁸ Based on our affirmance of the administrative law judge’s finding that claimant established total disability causation, we also affirm his determinations that claimant established a change in an applicable condition of entitlement under 20 C.F.R.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Modification of a Subsequent Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

§725.309(d) and a change in conditions under 20 C.F.R. §725.310. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).