



BRB No. 14-0444 BLA

CHARLES R. TEAGUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GRAYSON COAL & STONE COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	DATE ISSUED: 07/21/2015
c/o LIBERTY MUTUAL MIDDLE	)	
MARKET	)	
	)	
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-05478) of Administrative Law Judge Larry S. Merck, awarding benefits on a claim 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 subsequent claim filed on April 22, 2010.<sup>1</sup>

The administrative law judge credited claimant with 9.22 years of coal mine employment, as stipulated by the parties and supported by the record,<sup>2</sup> and found that while claimant's smoking history was varied, he smoked for a "substantial amount of time." Decision and Order at 5. The administrative law judge further found that the medical evidence developed since the denial of the prior claim established the existence of both legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant established that at least one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2010 claim on the merits. According greater weight to the more recent evidence submitted in the current claim, the administrative law judge found that the evidence, as a whole, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the evidence established that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant

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<sup>1</sup> Claimant's previous claim for benefits, filed on May 20, 2002, was denied by an administrative law judge on May 24, 2005, because claimant failed to establish any elements of entitlement. Director's Exhibit 1. The Board subsequently affirmed the denial of benefits. *Teague v. Grayson Coal & Stone Co., Inc.*, BRB No. 05-0757 BLA (Jan. 31, 2006) (unpub.). There is no indication that claimant took any further action in regard to his 2002 claim.

<sup>2</sup> The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 1; Hearing Transcript at 15. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc). Because claimant established fewer than fifteen years of coal mine employment, the amendment to the Act, reinstating a rebuttable presumption of total disability due to pneumoconiosis, which became effective on March 23, 2010, does not apply to this case. 30 U.S.C. §921(c)(4) (2012). Unless otherwise indicated, the relevant version of all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.<sup>3</sup>

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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is 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).

### **Legal Pneumoconiosis**

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).<sup>4</sup> The administrative law judge considered the new medical opinions of Drs. Habre, Forehand, Gallai, Broudy, and Rosenberg.<sup>5</sup> Drs. Habre, Forehand, and Gallai diagnosed legal pneumoconiosis, opining that claimant suffers from

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<sup>3</sup> Because no party has challenged the administrative law judge's finding that the evidence establishes the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26.

<sup>4</sup> "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).

<sup>5</sup> The administrative law judge noted that the record also contains medical opinion evidence submitted in connection with claimant's 2002 claim. However, the administrative law judge reasonably relied upon the more recent medical opinions, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 23.

an obstructive pulmonary impairment due, at least in part, to coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibit 13; Claimant's Exhibits 3, 8. Drs. Broudy and Rosenberg diagnosed cigarette smoking-induced chronic obstructive airways disease, and opined that claimant does not suffer from any coal mine dust-related disease or impairment. Employer's Exhibits 1, 2.

The administrative law judge discredited the opinions of Drs. Broudy and Rosenberg, in part, because he found their opinions to be inadequately explained and not well-reasoned.<sup>6</sup> Decision and Order at 14, 18. Conversely, the administrative law judge found that Dr. Habre's diagnosis of legal pneumoconiosis was well-reasoned and well-documented, and consistent with the regulations. The 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 relying on Dr. Habre's opinion to find legal pneumoconiosis established.<sup>7</sup> Employer asserts that Dr. Habre's opinion is conclusory and unreasoned, and that the administrative law judge failed to adequately explain his determination to credit Dr. Habre's opinion, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer also argues that the administrative law judge erred in crediting the opinion of Dr. Habre on the ground that it is consistent with the preamble to the 2001 revised regulations. Further, employer contends that the administrative law judge's "refus[al] to make any findings" regarding claimant's smoking history tainted his assessment of the reliability and credibility of Dr. Habre's opinion. Employer's Brief at 7-9, 11, 14. Employer's contentions lack merit.

Dr. Habre examined claimant, performed objective testing, and diagnosed chronic bronchitis, hypoxemia, and disabling chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 8. In finding Dr. Habre's opinion to be well-reasoned and well-documented, the administrative law judge noted that Dr. Habre considered a coal mine employment history of eight years as a driller and blaster, and a smoking history of twelve and one-half pack-years, and explained that coal mine dust and smoking "similarly . . . but independently . . . cause airway remodeling and bronchial

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<sup>6</sup> The administrative law judge also accorded less weight to the diagnoses of legal pneumoconiosis by Drs. Forehand and Gallai because he found that they were not sufficiently reasoned. Decision and Order at 12, 18.

<sup>7</sup> We affirm, as unchallenged on appeal, the administrative law judge's determination that the opinions of Drs. Broudy and Rosenberg, that claimant does not have legal pneumoconiosis, merited little weight. See *Skrack*, 6 BLR at 1-711.

inflammation” and “will lead to clinically significant decline in spirometric parameter despite the lack of fibrotic lung lesion.” Decision and Order at 19-20; Claimant’s Exhibit 8. The administrative law judge also noted that, in attributing claimant’s impairment, in part, to coal mine dust exposure, Dr. Habre acknowledged that claimant only worked for eight years, but explained that claimant’s work as a driller would have exposed him to “high-intensity coal mine dust.” Decision and Order at 19; Claimant’s Exhibit 8. Further, the administrative law judge acknowledged Dr. Habre’s explanation that dust retained in the airway will continue to cause subclinical inflammation that can continue to progress decades after retirement, even after the cessation of exposure, and that it was “well established that exposure to coal mine dust will cause obstructive, restrictive, or mixed pattern and ventilatory defect.” Decision and Order at 19; Claimant’s Exhibit 8. Crediting Dr. Habre’s conclusion that, while claimant’s COPD was “mainly” due to smoking, “it [was] clinically reasonable to conclude that coal mine dust does contribute to the abnormality in gas transfer, the presence of clinical symptoms as well as the presence of obstructive airflow,” the administrative law judge found that Dr. Habre’s opinion that coal mine dust “has contributed to [claimant’s] disabling lung disease,” supported a diagnosis of legal pneumoconiosis. Decision and Order at 19-20; Claimant’s Exhibit 8.

Contrary to employer’s argument, the administrative law judge permissibly credited the opinion of Dr. Habre as well-reasoned and well-documented because he found that Dr. Habre adequately considered claimant’s coal mine employment and smoking histories, based his opinion on objective evidence, and explained the basis for his conclusions consistent with the regulations and scientific studies which the Department of Labor has found credible. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 19-20.

Finally, there is no merit in employer’s suggestion that the omission of a definitive finding regarding the length of claimant’s smoking history rendered the administrative law judge’s credibility finding regarding Dr. Habre’s opinion irrational. Employer’s Brief at 14. Although the administrative law judge did not set forth a specific finding as to claimant’s smoking history, the administrative law judge acknowledged claimant’s testimony that he smoked one-half to three quarters of a pack per day for approximately twenty-five years, discussed the smoking histories recorded by the physicians of record,<sup>8</sup>

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<sup>8</sup> The administrative law judge noted that Dr. Forehand reported that claimant smoked one-half of a pack of cigarettes per day, on and off, from 1944 to 1995, or approximately twenty-five pack-years. Decision and Order at 5; Director’s Exhibit 13. The administrative law judge noted that Dr. Broudy indicated that claimant smoked less than or equal to one-half of a pack of cigarettes per day for approximately twenty-five

and rationally concluded that, while claimant's reported smoking history varied, the record established that claimant "smoked cigarettes for a substantial amount of time." *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 5. Further, in evaluating Dr. Habre's opinion, the administrative law judge specifically noted that Dr. Habre had considered "the significance" of claimant's smoking history. Decision and Order at 19. Moreover, in light of Dr. Habre's conclusion that claimant's COPD was "mainly" caused by his smoking history, but that his eight years of coal mine dust exposure had also contributed, employer has not shown how Dr. Habre's consideration of a twelve and one-half pack-year smoking history, rather than a longer history, undermined the credibility of his opinion.<sup>9</sup>

The determination of whether a medical opinion is sufficiently reasoned is a credibility determination for the administrative law judge to make. *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. The administrative law judge's decision reflects that he considered the quality of Dr. Habre's reasoning in light of the objective evidence of record, and explained why he credited Dr. Habre's conclusion that claimant's disabling COPD was due to both smoking and his coal mine dust exposure as a driller and blaster.<sup>10</sup>

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years. Decision and Order at 5; Employer's Exhibit 1. The administrative law judge noted that Dr. Rosenberg reported that claimant smoked less than one pack of cigarettes per day for approximately twenty-five years. Decision and Order at 5; Employer's Exhibit 2. The administrative law judge noted that Dr. Gallai recorded a smoking history of one-half of a pack of cigarettes a day for twenty to twenty-five years, and estimated that claimant had a ten to twelve and one-half pack-year smoking history. Decision and Order at 5; Claimant's Exhibit 3. Finally, the administrative law judge noted that Dr. Habre reported a smoking history of one-half of a pack of cigarettes per day for twenty-five years, or twelve and one-half pack-years. Decision and Order at 5; Claimant's Exhibit 8.

<sup>9</sup> Dr. Habre observed that claimant was exposed to high density coal mine dust because of his work as a driller, and opined that his coal mine dust exposure, independent of smoking, contributed to his respiratory impairment. Claimant's Exhibit 8.

<sup>10</sup> We reject employer's contention that there is no evidence in the record to support Dr. Habre's assertion that "drilling is associated with very high density coal mine dust and it is correlated with the presence of dust-induced lung disease." Employer's Brief at 13; Claimant's Exhibit 8 at 3. Contrary to employer's argument, after reviewing claimant's work history, Dr. Forehand recanted his prior opinion, that claimant's respiratory impairment was entirely due to smoking, stating:

Thus, we reject employer's contention that the administrative law judge's determination to credit Dr. Habre's opinion failed to comply with the requirements of the APA, and we affirm the administrative law judge's permissible finding that Dr. Habre's diagnosis of legal pneumoconiosis is "well-reasoned," and sufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b); *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 596-99, 25 BLR 2-615, 2-620-24 (6th Cir. 2014); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore affirm, as supported by substantial evidence, the administrative law judge's conclusion that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD arising out of coal mine employment, pursuant to 20 C.F.R. 718.202(a)(4). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

The administrative law judge also found that all of the evidence of record, when weighed together, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Dixie Fuel Co. v. Director, OWCP [Hensley]*, 700 F.3d 878, 881, 25 BLR 2-213, 2-218 (6th Cir. 2012); Decision and Order at 22-23. Because it is supported by substantial evidence, this finding is affirmed.<sup>11</sup>

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. . . I realize that I did not take into full consideration his 8 years as a blaster and rock driller at a surface mine. Coal miners employed as blasters and rock drillers can develop significant occupational lung disease, coal workers' pneumoconiosis and a totally-and-permanently disabling respiratory impairment from the intense exposure to blast dust, primarily silica, that occurs when exposed to rock drilling and blasting.

. . . I will amend my report to state that [claimant's] . . . totally-and-permanently disabling respiratory impairment [was] due to a combination of the affects [sic] of smoking cigarettes and exposure to dust from blasting and rock drilling as a coal miner.

Director's Exhibit 13. Moreover, none of the physicians of record, including employer's experts, stated that claimant did not have sufficient coal mine dust exposure to cause pneumoconiosis. Employer's Exhibits 1, 2; Claimant's Exhibit 3.

<sup>11</sup> 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

## Total Disability Due to Pneumoconiosis

Pursuant to 20 C.F.R. §718.204(c), employer argues that the administrative law judge erred in crediting the opinion of Dr. Habre to find that claimant is totally disabled due to legal pneumoconiosis.<sup>12</sup> We disagree. Contrary to employer's contention, we have held that the administrative law judge permissibly relied on the well-reasoned opinion of Dr. Habre to find that claimant established the existence of legal pneumoconiosis, in the form of a disabling obstructive impairment due to both smoking and coal mine dust exposure. Therefore, the administrative law judge rationally found that Dr. Habre's opinion supported a finding that legal pneumoconiosis is a "substantially contributing cause" of claimant's total disability, pursuant to 20 C.F.R. §718.204(c). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004); Decision and Order at 27. As employer makes no other argument regarding the administrative law judge's disability causation finding, we affirm the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), we affirm the administrative law judge's award of benefits.

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inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 23.

<sup>12</sup> We affirm, as unchallenged on appeal, the administrative law judge's determination to discredit the opinions of Drs. Broudy and Rosenberg, relevant to the cause of claimant's disabling impairment. *See Skrack*, 6 BLR 1-711.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge