

U.S. Department of Labor

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



BRB No. 15-0390 BLA

MICHELLE A. CROOKS)
(Widow of DAVID CROOKS))
)
Claimant-Respondent)
)
v.)
)
WABASH MINE HOLDING COMPANY) DATE ISSUED: 07/19/2016
)
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 Benefits and Order Denying Reconsideration and Granting in Part the Employer's Request for an Offset of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Macey Swanson and Allman), Indianapolis, Indiana, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

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

Employer appeals the Decision and Order Awarding Benefits and Order Denying Reconsideration and Granting in Part the Employer's Request for an Offset (2012-BLA-5753) of Administrative Law Judge Alice M. Craft, rendered on a survivor's claim filed on May 23, 2011, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).¹ The administrative law judge credited the miner with thirty-three years of underground coal mine employment but found that claimant did not establish that the miner was totally disabled due to a respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. The administrative law judge determined that claimant established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that his death was due to legal pneumoconiosis at 20 C.F.R. §718.205. Accordingly, the administrative law judge awarded benefits. Employer subsequently filed a motion for reconsideration, asking the administrative law judge to reconsider the medical opinion evidence and to approve an offset in the amount employer owed for interim benefit payments. The administrative law judge denied the request for reconsideration of the medical opinions, but granted the request for an offset, in part.

On appeal, employer argues that the administrative law judge erred in excluding its rebuttal reading of the January 31, 2008 chest x-ray and in subsequently finding that the x-ray and medical opinion evidence is inconclusive concerning the existence of clinical pneumoconiosis. In addition, employer contends that the administrative law judge erred in determining that claimant established that the miner had legal pneumoconiosis and that the miner's death was due to pneumoconiosis. Claimant

¹ Claimant is the widow of the miner, who died on October 9, 2008. Director's Exhibit 10. Because there is no evidence that the miner was awarded benefits, Section 422(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case. 30 U.S.C. §932(*l*) (2012).

² Section 411(c)(4) provides a rebuttable presumption that a miner's death is due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305.

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.³

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.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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Where the presumptions in Sections 411(c)(3)⁵ and (4) do not apply, death will be considered due to pneumoconiosis if claimant establishes that pneumoconiosis was a "substantially contributing cause or factor leading to the miner's death." 20 C.F.R. §718.205(b). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death, even if only briefly. 20 C.F.R. §718.205(b)(6); *see Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *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).

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had thirty-three years of underground coal mine employment, and that employer is not entitled to offset the award of federal black lung benefits to the survivor by the award of state benefits to the miner. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The record reflects that the miner's coal mine employment was in Illinois. Director's Exhibits 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁵ The administrative law judge found that the record contained no evidence to invoke the irrebuttable presumption of death due to pneumoconiosis set forth in Section 411(c)(3), 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Decision and Order at 24-25.

I. Existence of Legal Pneumoconiosis at 20 C.F.R. §718.202(a)(4)

The administrative law judge gave great weight to Dr. Houser's opinion that the miner had legal pneumoconiosis⁶ in the form of chronic obstructive pulmonary disease (COPD), chronic bronchitis, and hypoxemia due to coal dust exposure and cigarette smoking. Decision and Order 30; Director's Exhibit 30; Claimant's Exhibit 5. The administrative law judge determined that Dr. Houser's status as the miner's treating physician established that his diagnoses were "based on extensive familiarity with the [m]iner's condition over time." Decision and Order at 30. She further found that his opinion was "consistent with the premises underlying the current regulations." *Id.* The administrative law judge gave little weight to the opinions of Drs. Ballard and Fintel diagnosing COPD, but she found that they provided some support for Dr. Houser's opinion.⁷ *Id.* at 30-31; Claimant's Exhibit 6; Employer's Exhibits 7, 9. The administrative law judge gave less weight to Dr. Zaldivar's opinion that the miner did not have legal pneumoconiosis because she found that Dr. Zaldivar did not adequately explain how he excluded any contribution from coal dust exposure. Decision and Order at 31; Employer's Exhibits 5-6, 8. She also found that Dr. Zaldivar's opinion is inconsistent with the premises set forth by the Department of Labor in the preamble to the 2001 regulations that coal dust and cigarette smoking can affect the lungs through similar mechanisms and can have additive effects. Decision and Order at 32.

Employer argues that the administrative law judge erred in giving more weight to Dr. Houser's opinion based on his status as a treating physician without addressing the factors at 20 C.F.R. §718.104(d). Employer further alleges that Dr. Houser's opinion is not entitled to greater weight than Dr. Zaldivar's opinion, as Dr. Houser testified that he

⁶ Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

⁷ Dr. Ballard was the miner's primary care physician and testified at deposition that he treated the miner's chronic obstructive pulmonary disease (COPD), and several additional conditions. Claimant's Exhibit 6 at 6. He stated that he would attribute "some portion" of the miner's COPD to coal dust exposure, based on the scarring seen on the miner's chest x-ray. *Id.* at 14. Dr. Fintel reviewed the miner's medical records and acknowledged his history of "black lung" and COPD. Employer's Exhibit 7. He testified at deposition that the miner "would be more short of breath with exertion because of the black lung interacting with the [COPD] that the cigarettes caused" Employer's Exhibit 9 at 32.

did not review all of the medical evidence, and the only time he attributed the miner's COPD to coal dust exposure was in a letter dated February 1, 2002. In addition, employer asserts that Dr. Houser's opinion is entitled to little weight because, contrary to the administrative law judge's findings, he diagnosed clinical pneumoconiosis and a totally disabling respiratory impairment. Employer also observes that Dr. Houser based his opinion on the belief that most miners do not develop COPD, which is inconsistent with the preamble, and that his finding that the miner's COPD is due to coal dust exposure and smoking is based solely on generalities contained in the preamble. Finally, employer argues that the administrative law judge erred in crediting the opinions of Drs. Ballard and Fintel as being supportive of Dr. Houser's diagnosis of legal pneumoconiosis.⁸

Employer's assertion that the administrative law judge erred in according Dr. Houser's opinion the greatest weight is without merit. Pursuant to 20 C.F.R. §718.104(d),⁹ an administrative law judge is instructed to address the nature and duration of a treating physician's relationship to the miner and the frequency and extent of the treatment provided. Contrary to employer's contention, although the administrative law judge did not cite specifically to 20 C.F.R. §718.104(d), she rendered findings relevant to the nature and duration of Dr. Houser's relationship with the miner in addition to the frequency and extent of his treatment. The administrative law judge observed that Dr.

⁸ We affirm, as unchallenged by employer on appeal, the administrative law judge's discrediting of Dr. Zaldivar's opinion because it was inconsistent with the premises that coal dust and cigarette smoking can affect the lungs through similar mechanisms and can have additive effects. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 31.

⁹ The regulation at 20 C.F.R. §718.104(d) provides, in relevant part:

In weighing the medical evidence of record relevant to whether the miner . . . is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician: (1) nature of relationship . . . ; (2) duration of relationship . . . ; (3) frequency of treatment . . . ; and (4) extent of treatment[.]”

20 C.F.R. §718.104(d)(1)-(4).

Houser is a Board-certified pulmonologist who treated the miner for COPD and chronic bronchitis from February 1, 2002 to September 25, 2008 and saw him at regular office visits, during which Dr. Houser examined the miner, performed testing, and prescribed medications. Decision and Order at 30; Director's Exhibits 11, 30, 32, 34; Employer's Exhibits 12, 14, 16.

In addition, the administrative law judge acted within her discretion as fact-finder in determining that Dr. Houser's diagnosis of legal pneumoconiosis was well-reasoned and well-documented. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355-56 (7th Cir. 1990). Dr. Houser's treatment records reflect that he reviewed notes from other physicians, consistently diagnosed the miner with COPD and chronic bronchitis, noted the miner's use of oxygen, and routinely conducted pulmonary function studies to evaluate the miner's respiratory capacity, frequently observing that there was no significant improvement with bronchodilator administration. Director's Exhibits 11, 28-30, 32, 34; Employer's Exhibits 12, 14, 16. In a February 1, 2002 letter to Dr. Vyas, another of the miner's treating physicians, Dr. Houser specifically stated that "[t]he etiology of the chronic bronchitis is most likely related to cigarette smoking and exposure to coal and rock dust arising from his coal mine employment. He was advised to stop smoking and also to wear a mask at work." Employer's Exhibit 14. At his deposition on July 2, 2014, Dr. Houser testified that the miner's COPD and bronchitis were due to smoking and coal dust exposure and that his hypoxemia resulted from his lung disease that was due, in part, to coal dust exposure. Claimant's Exhibit 5 at 12-13. Dr. Houser indicated that "smoking would be a more significant factor. . . [but] [t]hat doesn't negate the effect of his coal mine exposure" and observed that the effects from both were "additive." *Id.* at 23-24.

The fact that Dr. Houser also diagnosed clinical pneumoconiosis and a totally disabling respiratory impairment, contrary to the administrative law judge's findings on those issues, did not require the administrative law judge to discredit his diagnosis of legal pneumoconiosis, which is an independent determination. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Furthermore, the alleged conflict between the preamble and Dr. Houser's testimony that "[t]he vast majority [of miners] do not [develop COPD]" has no bearing on the credibility of Dr. Houser's opinion in this case, where he identified coal dust exposure as a cause of the miner's COPD. Claimant's Exhibit 5 at 22; *see Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Because employer has not identified error in the administrative law judge's consideration of Dr. Houser's opinion requiring remand, we affirm her decision that his diagnosis of legal pneumoconiosis is "better documented and reasoned than the opinions of any of the other physicians." Decision and Order at 32; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Amax Coal Co. v. Burns*,

855 F.2d 499, 501 (7th Cir. 1988). Consequently, we affirm her finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a).¹⁰

II. Death Causation at 20 C.F.R. §718.205(b)

The administrative law judge considered the medical opinions of Drs. Houser, Ballard, Fintel, and Zaldivar regarding the cause of the miner's death. With respect to Dr. Houser, the administrative law judge stated:

Dr. Houser acknowledged that the [m]iner's primary cause of death was a myocardial infarction. He agreed with all the causes of death listed on the [m]iner's death certificate except for pneumonia, which he was unable to verify. He opined that coal-mining-related conditions contributed to or hastened the [m]iner's death. He said that the [m]iner's polycythemia¹¹ was due to his low oxygen levels, resulting from lungs damaged by COPD and emphysema, caused in part by coal and rock dust. Thus he believed that the [m]iner's death was hastened by lung disease which constituted legal pneumoconiosis. He stated that COPD is a risk factor for multiple cardiac insults and death. Although he agreed that it was possible that the [m]iner could have had a heart attack at the same time had he never worked in the mines, he still thought that coal mine dust exposure was a contributing factor. I have already found his opinion to have the greatest credibility on the issue of whether the [m]iner had pneumoconiosis. I give it great weight on this issue as well.

¹⁰ Any error in the administrative law judge's finding that the opinions of Drs. Ballard and Fintel supported Dr. Houser's opinion is harmless, because the administrative law judge ultimately based her legal pneumoconiosis finding on Dr. Houser's opinion alone, stating "I resolve the conflict in the medical opinion evidence by according the greatest probative weight to the opinion of Dr. Houser," as claimant's treating physician. Decision and Order at 32; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

¹¹ Polycythemia was described by Dr. Ballard as a condition where "the red blood cell count is elevated in the blood and . . . it can be to such a degree that the red blood cells have trouble getting through the small capillaries, arterioles and venules . . . and they're more prone to clotting, causing a stroke, heart attack or things like that." Claimant's Exhibit 6 at 10. Dr. Houser stated that his treatment relationship with the miner began after the miner suffered a stroke. Claimant's Exhibit 5 at 26. He further observed that the miner had monthly appointments with a phlebotomist to have red blood cells removed from his blood. *Id.* at 28-29.

Decision and Order at 33; *see* Director's Exhibit 30; Claimant's Exhibit 5 at 13, 46. The administrative law judge found that Dr. Ballard's opinion supported Dr. Houser's view because he agreed that lung damage worsened the miner's polycythemia, which increased his risk for a heart attack. Decision and Order at 34; Director's Exhibit 11; Claimant's Exhibit 6. The administrative law judge gave little weight to Dr. Fintel's opinion, that polycythemia possibly contributed to the severity of the miner's myocardial infarction, as Dr. Fintel identified smoking as the strongest causative factor in the miner's heart attack without explaining why coal dust exposure was not a contributing factor. Decision and Order at 34; *see* Employer's Exhibits 7, 9. Lastly, the administrative law judge determined that because Dr. Zaldivar was the only physician who "categorically denied" that the miner's lung condition or polycythemia played a role in his death, there was "no reason to credit his opinion over the others in the record." Decision and Order at 34; *see* Employer's Exhibits 5-6, 8. The administrative law judge concluded, "[b]ased on Dr. Houser's opinion, supported in some respects by both Dr. Ballard and Dr. Fintel, I find that the [c]laimant has established that the [m]iner died due to pneumoconiosis within the meaning of the statute and regulations." Decision and Order at 34.

Employer argues that the administrative law judge erred in giving great weight to Dr. Houser's opinion when he did not dispute the fact that the miner's death was due to a myocardial infarction and he did not participate in, or have knowledge of, the miner's treatment during his final hospitalization. Employer also contends that the administrative law judge erred in failing to address Dr. Houser's testimony that he was not sure that COPD contributed to the miner's heart attack, but rather that he knew that COPD could be a risk factor for multiple cardiac incidents. Employer further alleges that Dr. Ballard's opinion does not support Dr. Houser's opinion, and that the opinions of Drs. Fintel and Zaldivar were better supported by the evidence of record.

We reject employer's allegations of error. Contrary to employer's contention, the administrative law judge noted that Dr. Houser indicated at this deposition that the miner's heart attack could have occurred in the time and manner that it did even if he had not experienced dust exposure in coal mine employment. Decision and Order at 33; Claimant's Exhibit 5 at 42-43. This statement, and Dr. Houser's similar statement that he did not know whether COPD was a contributing cause of death in the miner's individual case, occurred in the context of Dr. Houser's testimony regarding the cause of the miner's myocardial infarction. Claimant's Exhibit 5 at 41-47. However, Dr. Houser also stated that it was his opinion that COPD was a contributing cause of the miner's death, based on an assessment of the extent of the miner's COPD, the hypoxemia and polycythemia that stemmed from it, and the medical literature showing that COPD increases the likelihood of a cardiac death. *Id.* at 13-15, 41-42, 44, 47. Thus, the administrative law judge rationally concluded that although Dr. Houser "acknowledge that the [m]iner's primary

cause of death was myocardial infarction . . . he believed that the [m]iner's death was hastened by lung disease which constituted legal pneumoconiosis." Decision and Order at 33. Accordingly, we affirm the administrative law judge's decision to accord great weight to Dr. Houser's opinion pursuant to 20 C.F.R. §718.205(b). See *Railey*, 972 F.2d at 183, 16 BLR at 2-128; *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992); see also *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014) ("The relationship between severe pulmonary impairment and cardiac functioning is well known. The body is an integrated organism. A part can drag down the whole.").

We further affirm the administrative law judge's determination that Dr. Zaldivar's opinion that COPD did not play a role in the miner's death was entitled to little weight because, contrary to the administrative law judge's finding, he did not diagnose legal pneumoconiosis, and he was the only physician to rule out any connection between the miner's COPD and his fatal heart attack. See *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 34.

Finally, we reject employer's argument that the administrative law judge erred in finding that the opinions of both Dr. Ballard and Dr. Fintel supported Dr. Houser's opinion "in some respects." Decision and Order at 34. The administrative law judge accurately found that, although Dr. Ballard stated that the miner's death was caused by a myocardial infarction, COPD was a contributing cause of death because it led to the miner's secondary polycythemia, which increased his risk of myocardial infarction. *Id.* at 33; Claimant's Exhibit 6 at 8, 10. Regarding Dr. Fintel's opinion, the administrative law judge correctly noted Dr. Fintel's statements that the miner's coronary artery disease was associated with his chronic lung disease and that the miner's polycythemia may have made his myocardial infarction worse. Decision and Order at 33; Claimant's Exhibit 6 at 10; Employer's Exhibit 7. Furthermore, the administrative law judge acted within her discretion in according little weight to Dr. Fintel's ultimate conclusion that the miner died a purely cardiac death because he did not adequately explain why legal pneumoconiosis did not constitute a substantially contributing cause or factor leading to the miner's death. See *Railey*, 972 F.2d at 183, 16 BLR at 2-128; *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56. We affirm, therefore, the administrative law judge's weighing of the medical opinion evidence relevant to the cause of the miner's death and her finding that Dr. Houser's opinion was sufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.205(b).¹²

¹² In light our affirmance of the administrative law judge's findings that claimant established that the miner had legal pneumoconiosis and that his death was due to legal pneumoconiosis, we need not address employer's contention that she erred in

See Railey, 972 F.2d at 183, 16 BLR at 2-128; *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Reconsideration and Granting in Part the Employer's Request for an Offset are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

determining that the x-ray evidence was inconclusive as to the existence of clinical pneumoconiosis. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.