

U.S. Department of Labor

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



BRB No. 18-0331 BLA

BENNY TURNER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLOVERFORK MINING & EXCAVATING)	
)	
and)	
)	
KENTUCKY EMPLOYERS MUTUAL)	DATE ISSUED: 07/24/2019
INSURANCE)	
)	
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 Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05570) of Administrative Law Judge Theresa C. Timlin, rendered on a claim filed on March 25, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Because claimant did not establish at least fifteen years of qualifying coal mine employment,¹ he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012). Turning to whether he established entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found the medical opinions established legal pneumoconiosis³ in the form of a disabling pulmonary impairment due to coal mine dust exposure and cigarette smoking under 20 C.F.R. §718.202(a)(4). She also found claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, she awarded benefits.

On appeal, employer contends the administrative law judge erred in finding claimant has legal pneumoconiosis and is totally disabled due to pneumoconiosis.⁴ Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to reject

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

² Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he has 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), as implemented by 20 C.F.R. §718.305.

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). The definition includes "any 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).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

employer's argument that claimant's evidence is insufficient to establish legal pneumoconiosis as defined at 20 C.F.R. §718.201.

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 be entitled to benefits under the Act, claimant must establish he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability is 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, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

LEGAL PNEUMOCONIOSIS

To establish legal pneumoconiosis, claimant must demonstrate that he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Dr. Alam opined that claimant has a disabling pulmonary impairment based on the results of his pulmonary function study that revealed a severe obstructive lung defect and arterial blood gas study that revealed a blood gas exchange impairment. Director's Exhibit 15 at 2-3, 33-34. He attributed the pulmonary impairment to coal mine dust exposure and cigarette smoking and thus diagnosed legal pneumoconiosis. *Id.* Drs. Dahhan and Jarboe opined that claimant has an obstructive respiratory impairment due to cigarette smoking, not coal mine dust exposure. Director's Exhibits 16, 22; Employer's Exhibits 1, 3.

The administrative law judge found Dr. Alam's opinion reasoned and documented and entitled to probative weight.⁵ Decision and Order at 31. She found the explanations provided by Drs. Dahhan and Jarboe unpersuasive because they are inconsistent with the regulations and the medical science accepted by the Department of Labor (DOL) in the

⁵ The administrative law judge also found Dr. Alam's opinion supported a diagnosis of legal pneumoconiosis because he attributed claimant's emphysema to coal mine dust exposure. Decision and Order at 21-22. She found this aspect of his opinion documented and consistent with the medical science accepted by the Department of Labor (DOL) in the preamble to the 2001 revised regulations. *Id.*

preamble to the 2001 revised regulations. *Id.* at 22-23. Thus she assigned their opinions reduced weight. *Id.*

Employer generally alleges that the opinions of Drs. Dahhan and Jarboe are well-reasoned and entitled to controlling weight, but does not identify any specific error by the administrative law judge in discrediting them. Employer's Brief at 8-9. We therefore affirm her finding that their opinions are entitled to reduced weight.⁶ *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *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 A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012).

Employer also argues that Dr. Alam's opinion is insufficient to establish legal pneumoconiosis because he did not "identify any specific 'chronic lung disease'" as required under 20 C.F.R. §718.201. Employer's Brief at 6-8. Contrary to employer's argument, claimant can establish legal pneumoconiosis by demonstrating a "chronic lung disease *or impairment*," that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). In his initial report, Dr. Alam opined that claimant has legal pneumoconiosis because coal mine dust exposure "is one of the cause[s] of [his] pulmonary disability." Director's Exhibit 15 at 33-34. In a

⁶ Even if employer's brief could be read as having raised a specific argument, substantial evidence supports the administrative law judge's credibility determinations. She noted Dr. Dahhan excluded legal pneumoconiosis because claimant "stopped working in coal mines fourteen years earlier, but continued to smoke." Decision and Order at 22. The administrative law judge rationally found this reasoning "ignores the principle that pneumoconiosis is a latent [and] progressive disease." *Id.*; *see* 20 C.F.R. §718.201(c); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014). She noted he also excluded legal pneumoconiosis because claimant's impairment had no restrictive component. Decision and Order at 22. She rationally rejected this reasoning as inconsistent with the definition of legal pneumoconiosis, which recognizes that legal pneumoconiosis may be purely obstructive. *See* 20 C.F.R. §718.201(a)(2); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012); Decision and Order at 22. She found Dr. Jarboe excluded legal pneumoconiosis because claimant's pulmonary function testing exhibited a parallel reduction in FEV1 and FVC values. Decision and Order at 22-23. She permissibly discredited this reasoning because it conflicts with the medical science accepted by the DOL that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio. *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491 (6th Cir. 2014); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 22-23.

supplemental report, he added that claimant “is disabled from a pulmonary point of view” and “this disability is permanent because [claimant] was found to [have] hypoxemia” on arterial blood gas testing along with variable CO₂ values, which “fall[s] into a category of chronic respiratory failure.” *Id.* at 2. The administrative law judge accurately found that Dr. Alam “attributed [c]laimant’s totally disabling respiratory impairment to exposures [from] both cigarette smoke and coal [mine] dust”⁷ and “stated in his supplemental report that seventeen years⁸ of confirmed coal mine employment is ‘a significant and major piece of information’ in determining the cause of [c]laimant’s respiratory problems.” Decision and Order at 31, *quoting* Director’s Exhibit 15 at 2-3. We thus reject employer’s argument that Dr. Alam’s opinion is not a diagnosis of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Employer’s Brief at 6-8.

We also reject employer’s argument that Dr. Alam’s opinion is not well reasoned because he based his diagnosis of legal pneumoconiosis exclusively on claimant’s coal mine dust exposure history. Employer’s Brief at 6-8. As found by the administrative law judge, Dr. Alam considered “several” potential “causes of [c]laimant’s total disability” prior to concluding that cigarette smoking and coal mine dust exposure “were both contributing factors.” Decision and Order at 31. Further, in support of his diagnosis, Dr. Alam noted that claimant “had been complaining of chronic sputum production with shortness of breath,” he “cannot do any exercise tests because of his shortness of breath,” and has “a barrel shape chest on his physical examination.” Director’s Exhibit 15 at 3. Dr. Alam also noted that claimant has an elevated respiratory rate and cited to the results of his

⁷ Addressing the etiology of claimant’s pulmonary disability, Dr. Alam explained that claimant’s history of cigarette smoking has caused “significant and continued lung damage.” Director’s Exhibit 15 at 33-34. However, he opined that claimant nonetheless “suffers from legal pneumoconiosis caused by his [seventeen] years of surface coal mining.” *Id.* Dr. Alam attributed ten percent of claimant’s “pulmonary issues” to coal mine dust exposure, and reiterated that “coal mine employment is still a significant and major piece of information” of claimant’s history. *Id.* Dr. Alam ultimately concluded that claimant has developed “secondary changes to his lungs” caused by cigarette smoking “as well as [seventeen] years” of coal mine dust exposure. *Id.*

⁸ The administrative law judge recognized that “Dr. Alam based his initial opinion on an understanding that [c]laimant had twenty-one years of coal mine employment; however, even when he adjusted that opinion to account for only seventeen years of coal mine employment, he still concluded that legal pneumoconiosis partially exacerbated [c]laimant’s underlying lung condition.” Decision and Order at 21; *see* Director’s Exhibit 15 at 2, 34.

pulmonary function and arterial blood gas testing. *Id.* at 2-3. Contrary to employer’s argument, the administrative law judge permissibly found Dr. Alam’s opinion attributing claimant’s disabling pulmonary impairment to cigarette smoking and coal mine dust exposure reasoned and documented. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (holding that a physician’s consideration of evidence “including a physical examination of [the miner], a diffusing capacity test, arterial blood-gas studies, and [the miner’s] personal and occupational history alone would have been sufficient to support a finding of legal pneumoconiosis); *Crisp*, 866 F.2d at 185; Decision and Order at 31.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As substantial evidence supports the administrative law judge’s credibility determinations, we affirm her finding that the medical opinion evidence establishes that claimant has legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).⁹ *See Martin*, 400 F.3d at 305; Decision and Order at 31.

DISABILITY CAUSATION

Employer next contends the administrative law judge erred in finding claimant’s legal pneumoconiosis a “substantially contributing” cause of his total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(c). Employer’s Brief at 9-10. We disagree.

Drs. Alam, Dahhan, and Jarboe all agreed that claimant has a disabling respiratory or pulmonary impairment but disagreed as to its etiology.¹⁰ As noted by the administrative

⁹ Because claimant established that his blood gas exchange impairment is legal pneumoconiosis, we need not address employer’s argument that the administrative law judge erred in finding that claimant’s emphysema arose out of coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer’s Brief at 6-8.

¹⁰ Dr. Alam opined that claimant is “disabled from a [pulmonary] standpoint” based on the results of his pulmonary function and arterial blood gas testing. Director’s Exhibit 15 at 33-34. In his supplemental report, Dr. Alam opined that claimant’s disability is permanent because he was hypoxemic and his CO₂ values fall into the category of chronic

law judge, Drs. Dahhan and Jarboe opined claimant's pulmonary disability is unrelated to legal pneumoconiosis and caused entirely by smoking. Director's Exhibits 16, 22; Employer's Exhibits 1, 3. She rationally gave their opinions little weight because neither physician diagnosed legal pneumoconiosis, contrary to her determination that claimant has the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 31.

Further, as discussed above, she permissibly determined that claimant's disabling pulmonary impairment *is* legal pneumoconiosis based on Dr. Alam's opinion. For the same reasons she credited Dr. Alam's opinion on legal pneumoconiosis, the administrative law judge permissibly credited his opinion regarding the etiology of claimant's disabling pulmonary impairment. *See Banks*, 690 F.3d at 489-90 (affirming finding that miner's pneumoconiosis was substantially contributing cause of his total disability where physician concluded that the miner's "cigarette smoking and his coal mine dust exposure" both contributed to his disabling lung disease); *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir.2014) (finding opinions from four doctors that disagreed about cause of miner's pulmonary impairment but were in accord about its effect constituted substantial evidence of death causation); *Crisp*, 866 F.2d at 185; Decision and Order at 31. Thus, we affirm the administrative law judge's determination that legal pneumoconiosis is a substantially contributing cause of claimant's total disability at 20 C.F.R. §718.204(c), and further affirm her finding that claimant is entitled to benefits under 20 C.F.R Part 718.

respiratory failure. *Id.* Dr. Dahhan opined that claimant is totally disabled by a severe obstructive ventilatory defect. Employer's Exhibit 1 at 16-17. Dr. Jarboe opined that claimant is totally disabled from a pulmonary standpoint because his FEV1 values on pulmonary function testing are qualifying and because he "has a severely impaired diffusion capacity and a moderate impairment of gas exchange manifested by the reduced pO2." Employer's Exhibit 3 at 33.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge