

U.S. Department of Labor

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



BRB No. 15-0439 BLA

DOYLE G. BAILES)	
)	
Claimant-Respondent)	
)	
v.)	
)	
C.C. CONLEY & SONS, INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	DATE ISSUED: 06/16/2016
PNEUMOCONIOSIS FUND)	
)	
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 on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Carl E. Hostler (Prim Law Firm, PLLC), Hurricane, West Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2012-BLA-5207) of Administrative Law Judge Richard A. Morgan 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 February 11, 2010,¹ and is before the Board for the second time.

In the initial decision, the administrative law judge found that the new evidence established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309(c). Consequently, the administrative law judge considered claimant's 2010 claim on the merits. After crediting claimant with thirteen years of coal mine employment,² the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a). However, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis⁴ pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence

¹ Claimant's initial claim, filed on October 7, 1998, was denied by the district director on December 9, 1998 for failure to establish any of the elements of entitlement. Director's Exhibit 1.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the administrative law judge credited claimant with less than fifteen years of coal mine employment, he found that claimant was not entitled to consideration under Section 411(c)(4). Therefore, the administrative law judge addressed whether claimant satisfied his burden to establish all of the elements of entitlement under 20 C.F.R. Part 718.

³ 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁴ "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).

established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the new evidence established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and that claimant, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *Bailes v. C.C. Conley & Sons, Inc.*, BRB No. 13-0528 BLA (May 13, 2014) (unpub.). However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* In light of this holding, the Board also vacated the administrative law judge's finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration.

In a Decision and Order on Remand dated June 29, 2015, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). 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(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 to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to legal 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 response brief.

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.⁵ 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).

⁵ The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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 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).

Employer argues 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). On remand, in reconsidering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Rasmussen, Bellotte, and Zaldivar.⁶ Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 25; Employer's Exhibit 16 at 28-29. Drs. Bellotte and Zaldivar, however, opined that claimant does not suffer from legal pneumoconiosis. Although Drs. Bellotte and Zaldivar agreed that claimant suffers from COPD/emphysema,⁷ they attributed the disease solely to cigarette smoking. Employer's Exhibits 1, 3, 17 at 32-34, 18 at 20-21.

In weighing the conflicting evidence, the administrative law judge found that Dr. Rasmussen's opinion that claimant has legal pneumoconiosis in the form of COPD/emphysema due to coal mine dust exposure and cigarette smoking was well reasoned. Decision and Order on Remand at 13, 16. Conversely, the administrative law judge found that the opinions of Drs. Bellotte and Zaldivar, that claimant does not suffer from legal pneumoconiosis, were not well reasoned because neither physician adequately explained why claimant's coal mine dust exposure did not contribute, along with other factors, to his COPD/emphysema. *Id.* at 9, 11. 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).

⁶ A fourth physician, Dr. Figueroa, diagnosed chronic obstructive pulmonary disease/emphysema, but did not offer an opinion regarding the etiology of the disease. Decision and Order on Remand at 15; Employer's Exhibit 14.

⁷ Drs. Bellotte and Zaldivar also diagnosed asthma unrelated to claimant's coal mine dust exposure. Employer's Exhibits 17 at 40, 18 at 20.

Employer argues that the administrative law judge erred in finding that Dr. Rasmussen's opinion is sufficient to establish the existence of legal pneumoconiosis. In crediting Dr. Rasmussen's determination that claimant suffers from legal pneumoconiosis, the administrative law judge noted that Dr. Rasmussen explained that claimant's test results "are consistent with both smoking-induced and coal mine dust-induced obstructive lung disease." Decision and Order on Remand at 13. The administrative law judge further noted that Dr. Rasmussen explained that he could not "eliminate coal mine dust exposure as a contributor to the claimant's obstructive disease because the effects [of coal mine dust exposure and cigarette smoking] are additive." *Id.* The administrative law judge further addressed the basis for Dr. Rasmussen's diagnosis, stating that:

Dr. Rasmussen considered both smoking and coal mine dust exposure as risk factors. He used the test results, x-ray and history of symptoms reported by the claimant to diagnose legal pneumoconiosis. Upon learning that the claimant had a shorter work history of coal mine dust exposure, he reasonably reconsidered and attributed less of [claimant's] impairment to coal mine dust exposure, but opined that it still significantly contributed. He noted that smoking and coal mine dust exposure cause indistinguishable disease, such as the claimant's severe COPD and emphysema. He explained why diagnosing bullous emphysema does not necessarily preclude legal pneumoconiosis, as it is a description of large emphysema, and the effects of smoking and coal mine dust exposure are additive, consistent with the preamble. 65 Fed. Reg. [79,920], 79,940 (Dec. 20, 2000).

Because he considered multiple causes for the claimant's impairment, clearly explained his reasoning behind his diagnoses, used objective testing in making his diagnoses, remained in compliance with the Act and preamble, and was willing to reconsider his opinion in light of new evidence, I reaffirm my finding that Dr. Rasmussen had the most well-reasoned and documented opinion, and consequently accord his opinion significant weight.

Decision and Order on Remand at 13.

Upon review of the administrative law judge's decision, we conclude that substantial evidence supports the administrative law judge's permissible determination that Dr. Rasmussen's opinion was "the most well-reasoned." Decision and Order on

Remand at 13; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

The administrative law judge also permissibly found that Dr. Rasmussen's opinion was supported by scientific findings cited in the preamble to the Department of Labor's revised regulations, that smokers who are exposed to coal mine dust have an additive risk for developing significant obstruction. See 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); Decision and Order on Remand at 13. Further, contrary to employer's contention, Dr. Rasmussen's opinion is sufficient to establish legal pneumoconiosis, as he opined that claimant's COPD/emphysema is due in part to coal mine dust exposure. See *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 309, 25 BLR 2-115, 2-120 (4th Cir. 2012).

We reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Bellotte and Zaldivar. The administrative law judge permissibly questioned the opinions of Drs. Bellotte and Zaldivar, that claimant's COPD/emphysema was due solely to smoking, because neither physician adequately explained how he eliminated claimant's coal dust exposure as a source of claimant's COPD/emphysema.⁸ See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order on Remand at 9, 11. The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Bellotte and Zaldivar.⁹ Because it is supported by substantial evidence, the

⁸ The administrative law judge found that Dr. Bellotte "failed to offer an adequate reason why coal mine dust exposure did not substantially aggravate the claimant's . . . emphysema." Decision and Order on Remand at 9. The administrative law judge found that Dr. Zaldivar did not "explain how he eliminated the claimant's . . . coal mine dust exposure as a factor which might aggravate the claimant's bullous emphysema . . . or why coal mine dust exposure is not a possible cause or aggravating factor." *Id.* at 11.

⁹ Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Bellotte and Zaldivar, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. See *Kozele v. Rochester and 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 the opinions of Drs. Bellotte and Zaldivar.

administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD/emphysema arising out of coal mine employment, is affirmed.¹⁰ See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted the opinions of Drs. Bellotte and Zaldivar because they did not diagnose legal pneumoconiosis. See *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 18. Moreover, as the administrative law judge rationally relied on the well-reasoned and documented opinion of Dr. Rasmussen to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Rasmussen's opinion supported a finding that claimant is totally disabled due to legal pneumoconiosis. Consequently, we affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

¹⁰ 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 inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order on Remand at 16.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge