

BRB No. 13-0435 BLA

CHARLES E. GRACE)
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 Claimant-Respondent)
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 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 05/29/2014
)
 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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5480) of Administrative Law Judge Alice M. Craft, rendered on a claim filed on July 21, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C §§901-944 (2012) (the Act). Based on the filing date of this claim, the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).¹ The administrative law judge credited claimant with at least thirty-two years

¹ Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in

of surface coal mine employment, but found that claimant was not entitled to invoke the amended Section 411(c)(4) presumption, as he did not establish that he worked at least fifteen years in conditions substantially similar to those in an underground mine. However, the administrative law judge determined that the evidence was sufficient to establish the existence of legal pneumoconiosis² pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

Employer asserts that the administrative law judge failed to properly place the burden of proof on claimant to establish the existence of legal pneumoconiosis. Employer contends that the administrative law judge treated the preamble as “binding” and erroneously made it the “sole basis” for determining the credibility of the medical opinions, contrary to the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).³ Employer’s Brief in Support of Petition for Review at 14. Employer also asserts that the administrative law judge improperly substituted her own opinion, for those of the medical experts, in finding that claimant suffers from legal pneumoconiosis.⁴ Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers’ Compensation Programs, has declined to participate 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 supported by substantial evidence, is rational,

conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

² 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).

³ Employer alleges that the administrative law judge “weighed the evidence based on a single principle in the preamble – that coal dust can cause obstructive lung disease,” and erroneously determined that any opinion attributing claimant’s obstructive respiratory impairment to coal dust exposure was consistent with the preamble, whereas any opinion that did not attribute it to coal dust exposure was contrary to the preamble. Employer’s Brief in Support of Petition for Review at 15.

⁴ We affirm, as unchallenged on appeal, the administrative law judge’s findings that claimant established at least thirty-two years of surface coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983)

and is in accordance with applicable law.⁵ 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 order to establish entitlement to benefits in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. Legal Pneumoconiosis

Initially, employer contends that the administrative law judge erred in relying on the preamble as the “sole basis” for evaluating the medical opinions. Employer’s Brief in Support of Petition for Review at 14. Employer concedes that an administrative law judge may consult the preamble so long as he or she “does not treat it as binding.” *Id.* Employer argues that the administrative law judge treated the preamble as “binding,” and thereby violated the APA. *Id.* Employer also alleges that the administrative law judge weighed the medical opinions based on a single principle that coal dust exposure can cause obstruction and thereby alleviated claimant of his burden of proving that his coal dust exposure significantly contributed to his respiratory condition.

The preamble to the amended regulations sets forth how the Department of Labor (DOL) has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Multiple circuit courts, and the Board, have held that an administrative law judge, as part of his deliberative process, may permissibly evaluate expert opinions in conjunction with DOL’s discussion of prevailing medical science contained in the preamble to the revised regulations. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 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). Based on our review, the administrative law judge conducted a proper analysis in this case, determining whether a physician’s opinion

⁵ Claimant’s last coal mine employment was in Indiana. Accordingly, the Board will apply the law 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); Director’s Exhibit 5.

was reasoned and documented and also consistent with the principles underlying the regulations, as set forth in the preamble. Accordingly, we reject employer's assertion that the administrative law judge erred in using the preamble as guidance in evaluating the medical opinion evidence.

In weighing the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinions of Drs. Murthy and Houser, that coal dust exposure was a substantially contributing cause of claimant's chronic obstructive pulmonary disease (COPD), over the contrary opinions of Drs. Repsher and Renn, that claimant does not suffer from a respiratory disease related to his coal mine employment. Decision and Order at 28-29; Director's Exhibit 26; Employer's Exhibits 1, 9, 11. Employer maintains that the opinions of Drs. Murthy and Houser are "general and conclusory" and do not support claimant's burden to establish the existence of legal pneumoconiosis. Employer's Brief at 17. Employer also argues that the administrative law judge erred in giving additional weight to Dr. Houser's opinion on the basis that he is a treating physician, even though Dr. Houser "only saw the claimant three times at most." *Id.* at 18. Employer's arguments are without merit.

We reject employer's contention that Dr. Murthy's opinion is insufficient to satisfy claimant's burden of proof. Dr. Murthy examined claimant on behalf of the DOL on May 28, 2008, and specifically opined that he suffered from legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/chronic bronchitis caused by coal dust exposure. Director's Exhibit 14. The administrative law judge permissibly credited Dr. Murthy's opinion as reasoned and documented, as she found that it was based on Dr. Murthy's examination findings, the objective medical evidence, and claimant's history of "30.25 years of coal mine employment compared to his relatively insignificant smoking history."⁶ Decision and Order at 29; *see Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer argues that the administrative law judge "overstated Dr. Houser's status as a treating physician," and erred in crediting his opinion that claimant has legal pneumoconiosis. We disagree. The administrative law judge observed correctly that Dr. Houser took over claimant's treatment for COPD in 2008, and that his notes reflect an

⁶ The administrative law judge found that claimant had "a minimal smoking history . . . smoking two to three cigarettes per day for three years, followed by a short period of time smoking cigars, all of which ended around 1968." Decision and Order at 4.

understanding of claimant’s medical, work, and smoking histories. Decision and Order at 27. The administrative law judge also observed correctly that Dr. Houser based his opinion, that coal dust exposure was a significant contributing cause of claimant’s COPD, on his review of “claimant’s extensive treatment records,”⁷ his own examination findings, and the report of Dr. Murthy. Decision and Order at 27. We conclude that the administrative law judge acted within her discretion in finding that Dr. Houser’s opinion was reasoned and documented, and also entitled to “great weight” in light of his “familiarity with [claimant’s] condition.” *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *Burns*, 855 F.2d at 501; Decision and Order at 27. Thus, because it is supported by substantial evidence, we affirm the administrative law judge’s determination that the opinions of Drs. Murthy and Houser are sufficient to establish that claimant has legal pneumoconiosis. *See Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501; *Clark*, 12 BLR at 1-155.

Furthermore, we reject employer’s assertions that the administrative law judge did not properly consider all of the explanations given by Drs. Repsher and Renn for their opinions that claimant does not have a coal-dust related lung condition, and that she erred in giving their opinions less weight. The administrative law judge observed correctly that Dr. Repsher diagnosed asthma and excluded coal dust exposure as an aggravating factor, based on his belief that “‘coal mine dust is really not that irritating’ so asthma would not fall into the category of legal pneumoconiosis.” Decision and Order at 28, *quoting* Employer’s Exhibit 11 at 24. The administrative law judge properly determined that Dr. Repsher’s view is “inapposite and contrary to the federal regulations.” Decision and Order at 28; *see* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (stating that “[t]he term ‘chronic obstructive pulmonary disease’ (COPD) includes three disease processes characterized by airways dysfunction: chronic bronchitis, emphysema, and asthma.”); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103. In addition, contrary to employer’s contention, the administrative law judge took into consideration Dr. Renn’s explanation that claimant’s irreversible obstruction is caused by remodeling of the airways due to asthma.⁸ However, the administrative law judge permissibly determined that Dr. Renn’s explanation was not persuasive, to the extent that he failed to explain why claimant’s

⁷ Claimant was initially treated by Dr. Henry from Evansdale Pulmonary Associates, from 2004-2008, and later by Dr. Houser, who is also with that practice. Employer’s Exhibit 4.

⁸ The administrative law judge noted that while claimant’s medical records document a history of cardiopulmonary health issues dating back to 1993, and treatment for repeated exacerbations of chronic obstructive pulmonary disease, beginning in 1998 and continuing to 2008, claimant was not treated specifically for asthma. Decision and Order at 26.

obstruction “could not also be due to coal dust exposure.” Decision and Order at 29; *see Burns*, 855 F.2d at 501; *Clark*, 12 BLR at 1-155.

Because the administrative law judge acted within her discretion in rendering her credibility determinations, we affirm her decision to accord less weight to the opinions of Drs. Repsher and Renn, based on her finding that they did not “adequately explain” why coal dust exposure did not at least contribute to claimant’s obstructive impairment. Decision and Order at 29; *see Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501; *Clark*, 12 BLR at 1-155. Thus, we affirm the administrative law judge’s finding that claimant established the existence of legal pneumoconiosis pursuant 20 C.F.R. §718.202(a)(4).

II. Disability Causation

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge gave controlling weight to the opinions of Drs. Murthy and Houser, that claimant is totally disabled due to pneumoconiosis. The administrative law judge further stated:

I can find no specific and persuasive reasons for concluding that Drs. Repsher’s and Renn’s judgment that exposure to coal dust did not cause or contribute to the [c]laimant’s disability did not rest upon their disagreement with my finding that the [c]laimant has legal pneumoconiosis.

Decision and Order at 31, *citing Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Employer argues on appeal that the administrative law judge “erred in summarily discounting the probative value of the opinions of employer’s experts,” because “*Toler* was not intended to allow [administrative law judges] to dismiss experts who explain that [claimant] had a different respiratory impairment (e.g., asthma or sleep apnea) than pneumoconiosis and that his disability was due to another ailment.” Employer’s Brief in Support of Petition for Review at 22, *citing Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

Contrary to employer’s assertion, an administrative law judge may properly discount the opinion of a physician, relevant to whether pneumoconiosis was a substantially contributing factor in a miner’s respiratory disability at 20 C.F.R. §718.204(c), if the physician did not diagnose the form of pneumoconiosis that the administrative law judge determined was established under 20 C.F.R. §718.202(a). *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Shonk*, 906 F.2d at 277; *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler*, 43 F.3d at 116, 19 BLR at 2-83. In this case, the administrative

law judge rationally rejected the opinions of Drs. Repsher and Renn, that claimant's disabling obstructive respiratory disease was unrelated to coal dust exposure, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that claimant has the disease. Consequently, we affirm the administrative law judge's determination that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and we further affirm the award of benefits. *See Chubb*, 312 F.3d at 890, 22 BLR at 2-528; *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-492 (7th Cir. 2002).

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge