

BRB No. 13-0106 BLA

JAMES R. ALSBROOKS)
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 Claimant-Respondent)
)
 v.) DATE ISSUED: 11/22/2013
)
 PITTSBURG & MIDWAY COAL MINING)
)
 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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-05862) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case, which involves a miner's claim filed on May 3, 2004,¹ is before the Board for the third time.²

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim because it was filed before January 1,

In the most recent appeal, the Board vacated the administrative law judge's finding that claimant established the existence of legal pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(4).⁴ *Alsbrooks v. Pittsburg & Midway Coal Mining*, BRB No. 11-0630 BLA (May 23, 2012) (unpub.). Specifically, the Board affirmed the administrative law judge's determination to discount the medical opinion of Dr. Selby, that claimant does not suffer from legal pneumoconiosis, on the ground that Dr. Selby's opinion is inadequately explained. *Alsbrooks*, BRB No. 11-0630 BLA, slip op. at 4. The Board vacated, however, the administrative law judge's determination to credit the opinions of Drs. Baker and Simpao, holding that the administrative law judge erred in not addressing the validity of the reasoning that the physicians provided for their opinions that claimant suffers from legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure. *Alsbrooks*, BRB No. 11-0630 BLA, slip op. at 5. The Board instructed the administrative law judge on remand to address the explanations for the physicians' conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Id.* In light of the

2005. The relevant version of all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

² The procedural history of this case is set forth in the Board's prior decisions. *Alsbrooks v. Pittsburg & Midway Coal Mining*, BRB No. 11-0630 BLA (May 23, 2012) (unpub.); *Alsbrooks v. Pittsburg & Midway Coal Mining*, BRB No. 09-0782 BLA (Sept. 10, 2010) (unpub.).

³ A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). 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). 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).

⁴ The Board previously affirmed the administrative law judge's finding that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Alsbrooks*, BRB No. 09-0782 BLA, slip op. at 5. The Board further affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant suffers from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). *Alsbrooks*, BRB No. 09-0782 BLA, slip op. at 2; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

decision to vacate the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the Board also vacated his finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instructed him to reconsider this issue, if necessary, on remand. *Id.* Specifically, if reached, the Board instructed the administrative law judge to determine whether clinical or legal pneumoconiosis is a "substantially contributing cause" of claimant's total disability pursuant to 20 C.F.R. §718.204(c). *Id.*

On remand, 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(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, 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). 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, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response to employer's 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, and is in accordance with applicable law.⁵ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In considering whether the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge

⁵ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

considered the opinions of Drs. Baker, Simpao, and Selby. Dr. Baker diagnosed legal pneumoconiosis, in the form of severe obstructive airway disease due to a combination of coal mine dust exposure and cigarette smoking. Claimant's Exhibit 4. In addition to diagnosing clinical pneumoconiosis, Dr. Simpao opined that claimant suffers from "moderate restrictive and severe obstructive airways disease." Director's Exhibit 12. Dr. Simpao further opined that claimant's "multiple years of coal dust exposure [were] medically significant in his pulmonary impairment." *Id.* In contrast, Dr. Selby opined that claimant does not suffer from any lung condition caused by his coal mine dust exposure. Employer's Exhibits 2, 3. Dr. Selby diagnosed asthma unrelated to coal mine dust inhalation, and COPD due to cigarette smoking. Employer's Exhibit 2 at 19, 32.

In evaluating the conflicting evidence, the administrative law judge correctly noted that his prior determination, to discount the medical opinion of Dr. Selby as inadequately explained, had been affirmed by the Board. Decision and Order at 3; *Alsbrooks*, BRB No. 11-0630 BLA, slip op. at 4. In contrast, the administrative law judge credited the opinion of Dr. Baker, as well-reasoned and documented, and supported by the opinion of Dr. Simpao, to find that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 5.

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Baker and Simpao. Employer contends that the administrative law judge failed to adequately consider that Dr. Baker relied on inaccurate smoking⁶ and coal mine employment⁷ histories, and did not administer post-bronchodilator pulmonary function testing. Employer's Brief at 10-13. Employer also maintains that the opinions of Drs. Baker and Simpao are unreasoned, as neither physician addressed whether asthma could be the cause of claimant's obstructive impairment. *Id.* Employer's arguments essentially request a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

⁶ Dr. Baker relied on a forty pack-year smoking history. Claimant's Exhibit 4. Dr. Simpao reported that claimant smoked one pack per day starting in 1961, and stopping in approximately January of 2004, for a total of forty-three pack years. Director's Exhibit 12. Dr. Selby testified that claimant reported a fifty-one pack-year smoking history. Employer's Exhibit 2 at 14. The administrative law judge did not make a specific finding as to the length of claimant's smoking history, but instead characterized his smoking habit as "heavy." Decision and Order at 5.

⁷ The administrative law judge credited claimant with twenty-nine years of coal mine employment. Decision and Order at 1.

Contrary to employer's argument, the administrative law judge correctly noted that Dr. Baker's opinion, that claimant's "coal workers' pneumoconiosis, resting arterial hypoxemia, and severe obstructive defect have all been significantly contributed to or are substantially aggravated by dust exposure in his coal mining employment," was based on a coal mine employment history of thirty years, a smoking history of forty pack-years, and the results of the most recent pulmonary function and blood gas testing of record. Decision and Order at 4-5; Claimant's Exhibit 4. The administrative law judge further found that Dr. Baker provided a reasoned explanation for his conclusions, taking into consideration the onset of claimant's respiratory symptoms, the time when claimant's obstruction became evident, the continuing decline in claimant's function, and the additive risks of smoking and coal mine dust exposure. Decision and Order at 5; Claimant's Exhibit 4.

Because the administrative law judge specifically found that Dr. Baker set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that both smoking and coal mine dust exposure contributed to claimant's COPD, we affirm the administrative law judge's permissible finding that Dr. Baker'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); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 5.

Moreover, contrary to employer's contention, the administrative law judge permissibly credited the opinion of Dr. Baker because he found his conclusions to be consistent with the Department of Labor's recognition, as set forth in the preamble to the revised regulations, that the risks of smoking and coal mine dust exposure are additive. Decision and Order at 5, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). An administrative law judge may permissibly examine whether the medical rationales expressed are consistent with the conclusions contained in the medical literature and scientific studies relied upon by the Department of Labor. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79,940-45 (Dec. 20, 2000); *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).

The administrative law judge also acted within his discretion in crediting the opinion of Dr. Simpao, that “multiple years of coal dust exposure [were] medically significant in [claimant’s] pulmonary impairment,” as supportive of Dr. Baker’s opinion. The administrative law judge noted that, while Dr. Simpao was not asked to elaborate on his conclusions, his opinion was nonetheless based on the results of his physical examination and objective testing, and accounted for claimant’s heavy smoking history. Thus, the administrative law judge permissibly found Dr. Simpao’s opinion to be sufficiently documented and reasoned. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 5. The administrative law judge further found that, like Dr. Baker’s opinion, Dr. Simpao’s opinion was consistent with DOL’s recognition that smokers who mine have an additive risk of developing obstructive impairments. Decision and Order at 5; 65 Fed. Reg. 79,940 (Dec. 20, 2000).

We reject employer’s contention that the administrative law judge erred in declining to discount the opinions of Drs. Baker and Simpao because they did not diagnose asthma. The administrative law judge noted that only Dr. Selby had diagnosed the disease, and reiterated his earlier determination that Dr. Selby’s opinion, that smoking and asthma alone caused claimant’s obstructive impairment, was not persuasive. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 4-5.

We therefore affirm, as supported by substantial evidence, the administrative law judge’s finding that Dr. Baker’s opinion, as supported by that of Dr. Simpao, is sufficient to establish the existence of legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Thus, we affirm the administrative law judge’s finding that the evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer next argues that the administrative law judge erred in finding that the evidence established that legal pneumoconiosis is a substantially contributing cause of claimant’s total disability pursuant to 20 C.F.R. §718.204(c). Contrary to employer’s contention, the administrative law judge rationally discounted the opinion of Dr. Selby because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge’s finding. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac’d sub nom. Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev’d on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 6; Employer’s Brief at 14-18. Moreover, as the administrative law judge rationally relied on the opinion of Dr. Baker, as supported by the opinion of Dr. Simpao, to find that claimant established the existence of legal pneumoconiosis, in the form of disabling COPD that is significantly related to, or

substantially aggravated by, coal mine dust exposure, he permissibly found that Dr. Baker'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 Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 303 (6th Cir. 2001); Decision and Order at 6. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's award of benefits.⁸

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁸ In light of the foregoing, we reject, as moot, employer's request that, if remanded, this case be reassigned to another administrative law judge. Employer's Brief at 18.