U.S. Department of Labor

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

BRB No. 19-0107 BLA

JEROME H. DEMOSS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 04/08/2020
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-06244) of Administrative Law Judge Colleen A. Geraghty on a claim rendered

under the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on March 5, 2015.

Based on her finding claimant had ten years of underground coal mine employment, the administrative law judge concluded he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). She also found no evidence of complicated pneumoconiosis, precluding invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Considering the issue of entitlement without benefit of the presumptions, the administrative law judge found claimant established legal pneumoconiosis substantially contributed to his total disability.[2] She therefore awarded benefits.

On appeal, employer asserts the administrative law judge erred in finding claimant established legal pneumoconiosis or disability due to pneumoconiosis. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief reiterating its contentions on appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis when he establishes 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.

[2] The administrative law judge noted the parties' stipulation that claimant has a totally disabling respiratory or pulmonary impairment and also found the evidence sufficient to establish disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 2-3, 25-26. We affirm the administrative law judge's finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Because the miner's coal mine employment occurred in Kentucky, 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); Director's Exhibit 76.

Entitlement - 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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 claimant has legal pneumoconiosis, claimant must prove he has "a 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). Contrary to employer's allegation, the administrative law judge applied the correct standard, noting that under the law of the United States Court of Appeals for the Sixth Circuit, claimant satisfies his burden by proving that his disease is caused "in part" by coal mine employment. Decision and Order at 28, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

In determining whether claimant satisfied the relevant standard, the administrative law judge considered the opinions of Drs. Chavda, Krefft, Castle, and Selby.[4] Decision and Order at 29-32; Director's Exhibits 10, 24, 57, 74, 14, 16; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 4, 5, 6, 7. Dr. Chavda diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to smoking and coal mine exposure. Director's Exhibit 67 at 39-40. Dr. Krefft diagnosed legal pneumoconiosis in the form of COPD/emphysema due to coal mine dust exposure and smoking. Claimant's Exhibit 6; Employer's Exhibit 7. In contrast, Drs. Castle and Selby opined that claimant does not have legal pneumoconiosis, but has an obstructive impairment due solely to smoking. Employer's Exhibits 1, 3-5. After reviewing Dr. Chavda's and Dr. Krefft's medical opinions, the administrative law judge found:

[4] The administrative law judge also reviewed Dr. Sandoval's treatment records from March 2010 to March 2017. Decision and Order at 24. Dr. Sandoval treated claimant for advanced chronic obstructive pulmonary disease (COPD), shortness of breath, and chronic respiratory failure. Claimant's Exhibit 3. There are no statements regarding the cause of these conditions in the treatment records.

> [T]he opinions of Dr. Chavda and Dr. Krefft are well-reasoned and supported by the objective medical evidence. They considered the Claimant's clinical and test findings, as well as his history of smoking and coal mine dust exposure, and cited to medical literature supporting their conclusions. Their opinions are also consistent with the Act, which recognizes that coal mine dust exposure can result in obstructive impairment even in the absence of x-ray findings of pneumoconiosis, and that its effects can be additive with those of smoking. I accord significant weight to their conclusions that the Claimant's respiratory impairment, COPD, was caused at least in part by his history of exposure to coal mine dust.

Decision and Order at 29. In contrast, she determined Dr. Castle's and Dr. Selby's opinions were entitled to diminished weight because they relied on premises that conflict with the scientific views the Department of Labor (DOL) endorsed in the preamble to the 2001 regulations. *Id.* at 30-32. The administrative law judge therefore found claimant established legal pneumoconiosis by the preponderance of the medical opinion evidence. *Id.* at 32.

Employer argues the administrative law judge erred in discrediting Dr. Castle's opinion because he relied solely on the decline in claimant's FEV_1/FVC ratio shown on the pulmonary function study he administered. Employer's Brief at 31-32. This contention is without merit. The administrative law judge acknowledged Dr. Castle cited several factors in support of his opinion that coal dust exposure is not a contributing cause of claimant's COPD/emphysema and provided valid reasons for discrediting each one.

The administrative law judge accurately found Dr. Castle relied, in part, on his view that claimant's significantly reduced FEV_1/FVC ratio is consistent with obstruction due to smoking rather than coal dust exposure.[5] Decision and Order at 29-30; Employer's Exhibits 1 at 11, 18 at 28. She permissibly discredited Dr. Castle's rationale as it conflicts

[5] Dr. Castle stated:

> When coal dust exposure causes obstruction, there is typically a concomitant reduction in the forced vital capacity and the FEV_1 resulting in a normal or nearly normal $FEV_1\%$ (FEV_1/FVC ratio). On the other hand, tobacco smoke induced airway obstruction causes a disparate reduction in the FEV_1 from the FVC. This results in a very significant decline in the $FEV_1\%$. That was the finding in this case where the $FEV_1\%$ was significantly reduced and there was disparate reduction in the FEV_1 from the FVC as well.

Employer's Exhibit 1.

with the medical science the DOL credits, which recognizes that coal mine dust exposure can cause clinically significant obstructive disease as measured by a reduction in the FEV_1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 29-30. Moreover, she rationally found Dr. Castle's opinion that the absence of x-ray evidence of clinical pneumoconiosis supports his conclusion claimant does not have legal pneumoconiosis is inconsistent with 20 C.F.R. §718.202(a)(4), which states that "[a] determination of the existence of pneumoconiosis may . . . be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in [20 C.F.R.] § 718.201."[6] 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. at 79,971; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012) (administrative law judge permissibly discounted physician's opinion that emphysema could not have been caused by coal mine dust exposure because insufficient dust retention was shown on the miner's x-rays); Decision and Order at 30.

Additionally, the administrative law judge rationally found Dr. Castle did not adequately explain why the irreversible portion of claimant's obstructive impairment indicated on his pulmonary function studies could not be due, in part, to coal mine dust exposure or why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 30, 31. Finally, the administrative law judge permissibly determined Dr. Castle's conclusion that claimant's reduced diffusion capacity indicated on his pulmonary function study is attributable to smoking because emphysematous destruction of lung tissue is an effect solely caused by smoking is at odds with the view the DOL accepts. 65 Fed. Reg. at 79,941 (citing with approval a study that found centrilobular emphysema is significantly more common among coal workers than non-coal workers). Having affirmed the administrative law judge's findings identifying deficiencies adversely affecting the credibility of Dr. Castle's opinion, we further affirm her determination it does not merit significant weight. Decision and Order at 31.

Employer next argues that the administrative law judge should have accorded controlling weight to Dr. Selby's opinion based on his status as claimant's treating physician. Employer's Brief at 7, 24-27; Employer's Reply Brief at 14-16. An administrative law judge can give controlling weight to a treating physician's opinion based on the nature and duration of his relationship with the miner and the frequency and

[6] Dr. Castle observed that coal dust exposure does not cause obstruction or a decrease in diffusing capacity unless it is accompanied by an x-ray showing a high profusion of opacities. Employer's Exhibits 1, 4 at 37.

extent of his treatment. 20 C.F.R. §718.104(d)(1)-(4). The weight given to a treating physician's opinion, however, "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (Treating physicians get "the deference they deserve based on their power to persuade.").

In this case, the administrative law judge acknowledged Dr. Shelby's status as claimant's treating physician. She considered his view that claimant's impairment from severe emphysema and asthma does not constitute legal pneumoconiosis because the impairment is not reversible, and that claimant's slightly less than ten years of coal dust exposure would be extremely unlikely to cause significant obstructive disease. Decision and Order at 5, 7; Employer's Exhibit 5. She rationally found that in attributing claimant's emphysema to smoking, Dr. Selby did not explain why claimant's significant history of coal mine dust exposure also could not be a contributing factor. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Cornett v. Benham Coal*, Inc., 227 F.3d 569, 576-77 (6th Cir. 2000); Decision and Order at 31.

Moreover, the administrative law judge acted within her discretion in finding Dr. Selby's opinion that claimant's less than ten years of coal mine dust exposure would be extremely unlikely to cause significant lung disease inconsistent with the DOL's recognition of the additive effects of coal mine dust exposure and smoking.[7] 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,941 (risk of developing clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure is additive with cigarette smoking); Decision and Order at 31. She also permissibly found Dr. Selby's view that reversibility on pulmonary function testing is inconsistent with a coal-dust related impairment undermined his opinion. *See Barrett*, 478 F.3d at 356; Decision and Order at 31. Based on the administrative law judge's reasonable determination that several factors detract from its credibility,[8] she was not required to give

[7] Dr. Selby indicated at his deposition that if one "knew" in a particular case that coal dust exposure had an additive effect on a patient's respiratory or pulmonary impairment caused primarily by smoking, that patient's "outcome" would be worse. Employer's Exhibit 5 at 25-26.

[8] Because the administrative law judge provided permissible reasons for according less weight to Dr. Selby's opinion, any error in according it less weight for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining argument that the administrative law judge also erred in according less weight to Dr. Selby's opinion because he diagnosed asthma "but the medical records of his treatment of the Claimant from 2012

Dr. Selby's opinion controlling weight because of his status as claimant's treating physician. *See Williams*, 338 F.3d at 501. Finally, because the administrative law judge provided valid rationales for determining Dr. Castle's and Dr. Selby's opinions were not credible, we reject employer's contention that she shifted the burden to employer to disprove legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99.

We further reject employer's contention the administrative law judge erred in crediting Drs. Chavda's and Krefft's diagnoses of legal pneumoconiosis. Citing portions of their reports and depositions, employer alleges that neither physician conclusively opined that claimant's COPD is significantly related to or substantially aggravated by claimant's coal mine employment dust exposure. Employer's Brief in Support of Petition for Review at 11-24; Employer's Reply Brief at 6-13. We disagree.

The administrative law judge summarized Dr. Chavda's and Dr. Krefft's opinions in detail, acknowledging they contain statements varying in certainty as to whether coal dust exposure played a causal role in claimant's COPD/emphysema. Decision and Order at 10-14, 20-24. She permissibly determined, however, that they ultimately concluded coal dust exposure was a contributing cause of claimant's COPD.[9] *See*; *Groves*, 761 F.3d at 598-99; Decision and Order at 14, 24; Director's Exhibit 67 at 45; Employer's Exhibit 7 at 47. In addition, contrary to employer's argument, Dr. Krefft's statement that she could not clearly differentiate between the effects of smoking and coal dust exposure did not require the administrative law judge to discredit her opinion. Where, as here, a physician opines that both smoking and coal dust exposure had a material adverse effect on a miner's respiratory condition, the physician need not apportion the relative contributions of smoking and coal dust exposure. *See Barrett*, 478 F.3d at 356; *Cornett*, 227 F.3d 569.

Employer also argues the administrative law judge erred in failing to address Dr. Krefft's lack of clinical experience when weighing the physicians' respective

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through February 2015 do not reflect a diagnosis of or mention asthma." Decision and Order at 31 n.7; Director's Exhibit 47.

[9] When asked at his deposition to state his final conclusion as to the role coal dust exposure played in claimant's obstructive lung disease, Dr. Chavda stated, "work for ten years in [coal mining] with that much exposure, that also had a contributing role in development of his COPD and his pulmonary impairment." Director's Exhibit 67 at 45. Dr. Krefft was also asked at his deposition to summarize her conclusion regarding the cause of claimant's total respiratory disability and responded, "[t]o a reasonable degree of medical certainty, based on the totality of evidence, I think that definitely there is – that his coal mine dust exposure caused legal pneumoconiosis." Employer's Exhibit 7 at 47.

qualifications. Employer's Brief at 20; Employer's Reply Brief at 11. We disagree. The administrative law judge accurately found all four physicians are Board-certified in internal and pulmonary medicine,[10] and although she could have addressed the extent of Dr. Krefft's clinical experience, she was not required to do so. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) ("The determination as to whether [a physician's] report was sufficiently documented and reasoned is essentially a credibility matter. . . . for the factfinder to decide."). We also reject employer's suggestion Dr. Krefft's opinion should have been discounted because she only reviewed claimant's medical records rather than a physical examination. Employer's Reply Brief at 11. An administrative law judge cannot discredit a medical opinion solely because the physician did not examine the miner, but must consider the reliability and reasoning underlying the opinion. *See Collins v. J & L Steel* (*LTV Steel*), 21 BLR 1-181, 1-189 (1999); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). Having affirmed the administrative law judge's credibility determinations of the medical opinion evidence, we affirm her finding that claimant established the existence of legal pneumoconiosis by the preponderance of the credible medical opinions. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881 (6th Cir. 2012); Decision and Order at 32.

Disability Causation

Employer also alleges the administrative law judge erred in finding Dr. Krefft's opinion sufficient to establish disability causation, raising the same allegations of error it raised regarding her weighing of his opinion on the existence of legal pneumoconiosis.[11] Employer's Brief in Support of Petition for Review at 11, 18; Employer's Reply Brief at 4 n.4. We disagree. The administrative law judge articulated the proper standard: claimant must establish pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and

[10] The administrative law judge noted Dr. Krefft is also Board-certified in occupational medicine. Decision and Order at 21; Claimant's Exhibit 6.

[11] Employer also contends the administrative law judge erred in relying on Dr. Chavda's opinion to find claimant established he is totally disabled due to legal pneumoconiosis. Employer's Brief in Support of Petition for Review at 11, 18; Employer's Reply Brief at 4 n.4. The administrative law judge found, however, that Dr. Chavda's opinion was insufficient to meet claimant's burden on disability causation as he "repeatedly stated smoking was the primary cause of the Claimant's total disability and that exposure to coal mine dust 'may not be a substantial factor.'" Decision and Order at 32-33, *quoting* Director's Exhibit 67 at 29.

Order at 32. Pneumoconiosis is a "substantially contributing cause" of a miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1); 65 Fed. Reg. at 79,946-47; *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610-11 (6th Cir. 2001); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997) (miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment).

The administrative law judge permissibly determined Dr. Krefft provided a well-reasoned opinion satisfying the "substantially contributing cause" standard as she "consistently opined [c]laimant's smoking and 10 years of coal mine dust exposure both substantially contributed to his total disability" and "stated his impairment would not be as severe if he had not worked in a coal mine[.]" Decision and Order at 33; *see Kirk*, 264 F.3d at 611-12 (claimant satisfies burden of establishing disability causation by proving coal dust exposure made his disabling respiratory or pulmonary condition worse); Claimant's Exhibit 6; Employer's Exhibit 7 at 47. Moreover, she acted within her discretion in according "no weight" to Dr. Selby's and Dr. Castle's opinions that claimant is not totally disabled due to pneumoconiosis because neither of these physicians diagnosed legal pneumoconiosis, contrary to her finding. Decision and Order at 33; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993); *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995). We therefore affirm the administrative law judge's finding claimant has established pneumoconiosis was a substantially contributing cause of his total disability based on Dr. Krefft's opinion. *See Smith*, 127 F.3d at 507; *Napier*, 301 F.3d at 713-14; Decision and Order at 33. Having affirmed the administrative law judge's finding claimant established legal pneumoconiosis caused his disability, we further affirm her finding claimant established entitlement to benefits. *See Anderson*, 12 BLR at 1-112; Decision and Order at 33.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge