

BRB No. 11-0419 BLA

RUBY COX<sup>1</sup> )  
(o/b/o FLOYD B. COX) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
ENERGY COAL INCOME PARTNERSHIP )  
 )  
and )  
 ) DATE ISSUED: 02/23/2012  
WEST VIRGINIA COAL WORKERS' )  
PNEUMOCONIOSIS FUND )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
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 Denying Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

---

<sup>1</sup> Claimant, the administrator of the miner's estate, was substituted as the claimant after the miner passed away. Decision and Order on Remand at 1 n.1.

Claimant appeals the Decision and Order On Remand Denying Benefits (2007-BLA-05668) of Administrative Law Judge Pamela J. Lakes rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).

This case involves a miner's claim filed on June 22, 2006, and is on appeal for the second time.<sup>2</sup> Director's Exhibit 2. In her initial decision, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but that the evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>3</sup> The administrative law judge also found that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found, however, that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, the Board affirmed, as unchallenged, the administrative law judge's determination that the miner had "at most" eight years and three months of qualifying coal mine employment. The Board also affirmed the administrative law judge's findings that the miner established the existence of clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a) and 718.203(c), and the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b). The Board vacated, however, the administrative law judge's denial of benefits, finding that she failed to adequately explain her weighing of Dr. Hussain's opinion regarding the cause of the miner's disabling impairment, pursuant to 20 C.F.R. §718.204(c). *Cox v.*

---

<sup>2</sup> The complete procedural history of this case, set forth in the Board's prior decision in *Cox v. Energy Coal Income P'ship*, BRB No. 09-0691 BLA (Aug. 31, 2010) (unpub.), is incorporated herein by reference.

<sup>3</sup> Clinical pneumoconiosis is defined as "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 tissue 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

*Energy Coal Income P'ship*, BRB No. 09-0691 BLA (Aug. 31, 2010) (unpub.). Specifically, the Board held that in discrediting Dr. Hussain's opinion, that the miner's disabling impairment was "100%" due to pneumoconiosis, the administrative law judge failed to explain why Dr. Hussain's mistaken belief that the miner worked underground, rather than in strip mines, made his opinion less credible. *Id.* at 7. The Board also concluded that, in light of her finding that smoking did not contribute to the miner's impairment, the administrative law judge did not adequately explain her decision to discredit Dr. Hussain, based on his statement that his conclusion would change if he learned that the miner had not quit smoking. *Id.* The Board instructed the administrative law judge to address, on remand, whether Dr. Hussain's opinion was reasoned and documented, and to determine whether the miner established, under 20 C.F.R. §718.204(c), that he was totally disabled due to pneumoconiosis. *Id.*

On remand, the administrative law judge again found that the medical opinion evidence did not establish that the miner's total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in discounting Dr. Hussain's opinion as to whether the miner was totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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.<sup>4</sup> 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).

To establish entitlement to benefits under 20 C.F.R. Part 718, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 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*).

---

<sup>4</sup> As we previously held, the miner's last coal mine employment was in West Virginia. *Cox*, BRB No. 09-0691 BLA, slip op at 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Claimant asserts that the administrative law judge erred in discrediting the opinion of Dr. Hussain, relevant to the cause of the miner's disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c).

In evaluating, on remand, Dr. Hussain's opinion that the miner's disabling pulmonary impairment was due to pneumoconiosis, the administrative law judge initially clarified that she did not find that Dr. Hussain's mistaken belief that the miner worked underground, rather than in strip mines, detracted from the credibility of his opinion. Rather, she found Dr. Hussain's opinion undermined by his reliance on an inaccurate history of greater than ten years of coal mine employment, when she had found, at most, eight years and three months of coal mine employment.<sup>5</sup> Decision and Order on Remand at 3-4. As claimant asserts, the administrative law judge did not explain why the discrepancy in the length of the miner's coal mine employment was significant enough to affect the credibility of Dr. Hussain's opinion on causation. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986). Nor is it clear how the length of the miner's coal mine employment is relevant to the issue of whether his clinical pneumoconiosis caused his disabling respiratory impairment, where the administrative law judge had already found that the medical evidence established that the miner's clinical pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203(b)-(c).

However, the administrative law judge also discredited Dr. Hussain's opinion for a second reason. The administrative law judge correctly noted that, in his medical report, Dr. Hussain opined that the miner had a moderately severe impairment and hypoxemia that is "100%" due to pneumoconiosis, Director's Exhibit 9, but in his subsequent deposition, Dr. Hussain clarified that he believed that the miner's restrictive impairment, shown in the pulmonary function testing, was due, in part, to obesity, as well as to inconsistent and poor effort. Decision and Order on Remand at 4; Employer's Exhibit 5 at 10, 13. As to the cause of the miner's hypoxemia, the administrative law judge noted that while Dr. Hussain acknowledged that obesity could also cause hypoxemia, Dr. Hussain stated that he did not attribute the miner's hypoxemia to obesity in this case, because "obesity can not cause nodular opacities" of pneumoconiosis, as demonstrated on the miner's x-rays. Decision and Order on Remand at 4; Employer's Exhibit 5 at 13-14. Evaluating Dr. Hussain's conclusions, the administrative law judge stated:

I do not find that explanation to be reasoned on the issue of what caused the hypoxemia. I also do not find Dr. Hussain's opinion to be documented.

---

<sup>5</sup> The administrative law judge explained that she did not find it significant that Dr. Hussain assumed that the miner worked underground, rather than in a strip mine, as the record reflects. Decision and Order on Remand at 3-4.

Even when both his report and deposition are considered, [Dr. Hussain's] only rationale for attributing the [miner's] disability from hypoxemia to his pneumoconiosis was the existence of nodular x-ray abnormalities and his work history.<sup>6</sup> . . . Under these circumstances, I continue to find that there is no reasoned, documented opinion establishing disability causation in accordance with 20 C.F.R. §718.204(c)(1).

Decision and Order on Remand at 4-5. Contrary to claimant's arguments, in finding, as was within her discretion, that Dr. Hussain's opinion as to the cause of the miner's hypoxemia is inadequately explained and unreasoned, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997), the administrative law judge has provided an independently affirmable basis for discrediting his opinion. Decision and Order on Remand at 4; Claimant's Brief at 16-17. Therefore, the administrative law judge's error, if any, in also discounting Dr. Hussain's opinion as based on an inaccurate coal mine employment history, is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Nor is there merit to claimant's contention that, even if Dr. Hussain's opinion should be discounted, it still outweighs the opinions of Drs. Dahhan and Jarboe, and thus supports a finding of disability causation and an award of benefits. Claimant's Brief at 16-17. Specifically, claimant contends that, as neither Dr. Dahhan nor Dr. Jarboe diagnosed clinical pneumoconiosis, contrary to the administrative law judge's findings, their opinions cannot constitute contrary probative evidence on the issue of whether pneumoconiosis caused the miner's disabling respiratory impairment. Claimant's Brief at 17, *citing Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002). Thus, claimant contends, even Dr. Hussain's "relatively unreasoned medical report" may constitute substantial evidence "sufficient to merit an award of benefits." Claimant's Brief at 17. Contrary to claimant's argument, on remand, the administrative law judge specifically considered, and rejected, this argument, stating that she "agree[d]" that the opinions of Drs. Dahhan and Jarboe "are deficient, particularly because neither diagnosed clinical pneumoconiosis," but found that:

. . . a deficiency in those opinions cannot compensate for the lack of a reasoned, documented opinion showing that the [miner's] clinical

---

<sup>6</sup> The administrative law judge reiterated that "it is impossible to say that [Dr. Hussain's] use of an inaccurate work history was harmless or that it does not detract from the probative value of his opinion." Decision and Order on Remand at 4.

pneumoconiosis had a material adverse effect on his breathing or that it materially worsened his obesity-related breathing impairment.

Decision and Order on Remand at 5.

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if the evidence does not establish a requisite element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Moreover, the administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993), and the Board is not empowered to reweigh the evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999). Because the administrative law judge permissibly concluded that Dr. Hussain's opinion is not sufficiently reasoned to carry claimant's burden of proof, despite the lack of contrary probative evidence, we affirm the administrative law judge's determination that claimant has failed to establish disability causation, an essential element of entitlement. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order On Remand Denying Benefits is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge