BRB No. 04-0652 BLA

JOHN D. AKERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KANAWHA COAL COMPANY	)	
	)	DATE ISSUED: 04/29/2005
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2002-BLA-5301) of Administrative Law Judge Gerald M. Tierney awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with thirty-one years of qualifying coal mine employment, and found that this case involved the filing of a subsequent claim on February 12, 2001, pursuant to 20 C.F.R. §725.309. Based on the date of filing, the administrative law judge adjudicated this subsequent claim pursuant to the provisions at 20 C.F.R. Part 718, and determined that claimant's earlier claims had been denied because claimant failed to prove any of the elements of entitlement. The administrative law judge found that the weight of the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and thus, claimant had proved that one of the conditions for entitlement had changed since the prior denial. Weighing all of the evidence of record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the medical opinions in finding the existence of pneumoconiosis and disability causation established at Sections 718.202(a)(4) and 718.204(c). Employer also contends that the administrative law judge erred in excluding portions of the opinions of Drs. Zaldivar and Altmeyer from consideration. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, declining to address the merits of this case but urging the Board to reject employer's arguments regarding the administrative law judge's exclusion of discussions of inadmissible evidence from consideration pursuant to 20 C.F.R. §725.457(d). Employer has filed a reply brief in support of its position.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After considering the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. Initially, we reject employer's contention that the administrative law judge erred in not considering the opinions of Drs. Zaldivar and Altmeyer in their entirety, including discussions of inadmissible evidence. The regulations, as amended, provide that only admissible medical evidence may appear in medical reports submitted by the claimant or the responsible operator, *see* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), and that a physician whose testimony is admissible may testify as to any other medical evidence of record, but

shall not be permitted to testify as to any medical evidence that is inadmissible, *see* 20 C.F.R. §725.457(d).

In the present case, the administrative law judge issued an Order on September 16, 2003, revoking the evidentiary rulings made at the hearing and requiring the parties to resubmit evidence in accordance with an evidentiary schedule and the evidentiary limitations set forth in the regulations, as amended. The administrative law judge determined that a sequential submission of evidence was necessary to provide all parties an opportunity to designate the evidence developed in support of their affirmative case and then to file any objections and submit rebuttal and rehabilitative evidence in compliance with both the twenty-day rule at 20 C.F.R. §725.456 and the evidentiary limitations at 20 C.F.R. §725.414. The administrative law judge summarized the limitations on evidence, noting that the United States Court of Appeals for the District of Columbia Circuit upheld the validity of the regulations, as amended, in *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The administrative law judge subsequently issued: (1) a Revised Order on September 25, 2003, which clarified the evidentiary schedule; (2) an Evidentiary Order on October 29, 2003, which admitted the reports of Drs. Zaldivar and Altmeyer into the record but indicated that, while the physicians' comments concerning the Department of Labor's examination shall be included, all discussions of inadmissible evidence contained in the reports shall be excluded; and (3) an Order of December 30, 2003, ruling on rebuttal and rehabilitative evidence and setting the briefing schedule. As the administrative law judge identified the evidence which he admitted into the record, *see* Decision and Order at 3, there is no merit to employer's argument that it was impossible for employer to determine what evidence the administrative law judge refused to consider. Employer's Brief at 7. Moreover, the Director correctly notes that it does not appear that any physician's consideration of inadmissible evidence had a negative impact on the weight which was accorded to his opinion; rather, the administrative law judge considered the respective qualifications of the physicians, and properly assigned the medical opinions appropriate weight based on the admissible documentation and reasoning underlying each physician's conclusions. Director's Brief at 3; Decision and Order at 5-9; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999).[1] As the administrative law judge's exclusion of discussions of inadmissible evidence from consideration comports with the regulations and applicable precedent, we hold that the administrative law acted within his discretion in this regard.

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

See 20 C.F.R. §§725.414, 725.457; *Dempsey v. Sewell Coal Co.*, 23 BLR 1- 47 (2004)(*en banc*).

Turning to the merits, employer contends that the administrative law judge improperly discounted the opinions of Drs. Zaldivar and Altmeyer, that claimant did not have pneumoconiosis and that his obstructive impairment was due solely to smoking, and that the administrative law judge erroneously relied on the contrary opinions of Drs. Cohen and Rasmussen to find the existence of pneumoconiosis and disability causation established at Sections 718.202(a)(4) and 718.204(c), respectively. Noting that the administrative law judge found the weight of the x-ray evidence insufficient to establish the existence of pneumoconiosis, employer asserts that the opinions of Drs. Cohen and Rasmussen are unreasoned, as Dr. Cohen's conclusions were based in part on positive x-rays, and Dr. Rasmussen's diagnosis of pneumoconiosis was based solely on a history of coal dust exposure and a positive x-ray. Further, employer maintains that because Dr. Cohen offered two potential explanations for claimant's obstructive pulmonary impairment, the physician was required to specify what evidence allowed him to distinguish between the effects of smoking and those of coal dust exposure, or to explain how any portion of the impairment was directly attributable to coal dust exposure rather than smoking alone. Employer's arguments are without merit.

The administrative law judge accurately reviewed the relevant medical opinions of record and acted within his discretion in finding that the opinion of Dr. Cohen was well reasoned, the most persuasive, and entitled to determinative weight. Decision and Order at 5-9; *see Collins*, 21 BLR 1-181. In so finding, the administrative law judge noted that Dr. Cohen reviewed all of the evidence developed in the record, and was aware of the full extent of claimant's smoking and coal dust exposures. The administrative law judge determined that Dr. Cohen acknowledged that the x-ray evidence was conflicting, and explained why he would continue to attribute claimant's disabling obstructive impairment to both smoking and coal dust exposure in the absence of positive x-rays, citing to medical literature in support of his position. Decision and Order at 7-9; Claimant's Exhibit 4. The administrative law judge thus concluded that Dr. Cohen's opinion was sufficient to establish legal pneumoconiosis. Decision and Order at 9; *see* 20 C.F.R. §718.201(a)(2).

By contrast, the administrative law judge determined that Drs. Zaldivar and Altmeyer relied at least in part on the negative x-ray evidence to rule out coal dust exposure as a source of claimant's pulmonary impairment, yet neither physician reviewed the most recent x-ray interpretations which demonstrated that equally qualified experts disagreed as to whether clinical pneumoconiosis was present. Decision and Order at 4, 8-9; Employer's Exhibits 3, 4. Although Dr. Zaldivar recognized that there can be pathological evidence of pneumoconiosis absent positive x-rays, the physician indicated that one cause of airway obstruction was the reaction of the lungs to coal dust, and that

the absence of pneumoconiosis radiographically meant that the dust burden of the lungs was very low, if at all. Decision and Order at 6; Employer's Exhibit 3. The administrative law judge observed, however, that Section 718.202(a)(4) provided a miner with the opportunity to prove the existence of legal pneumoconiosis in the absence of positive x-ray evidence. Decision and Order at 8.

The administrative law judge acknowledged the impressive credentials of Drs. Zaldivar and Altmeyer, but determined that Dr. Cohen's curriculum vitae demonstrated a greater level of expertise in the specific area of coal workers' pneumoconiosis. Decision and Order at 9; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Dr. Cohen observed that it did not automatically follow that the dust burden of claimant's lungs was very low even if the sum of the x-ray evidence were negative, and opined that claimant not only had significant airways obstruction but also suffered a severe gas exchange impairment caused by both smoking and coal dust exposure. Decision and Order at 7-8; Claimant's Exhibit 4. The administrative law judge further determined that Dr. Cohen's opinion was buttressed by that of Dr. Rasmussen, who diagnosed a minimal obstructive insufficiency, moderately reduced maximum breathing capacity and single breath carbon monoxide diffusing capacity, and a marked impairment in oxygen transfer on exercise blood gas studies, and concluded that claimant's cost dust exposure was a "major contributing factor in view of the pattern of considerably greater gas exchange impairment than ventilatory impairment."[2] Director's Exhibit 12; Decision and Order at 5, 9. While Dr. Altmeyer disagreed with Dr. Rasmussen's conclusions, the administrative law judge was unable to discern the relevancy of Dr. Altmeyer's rationale, which focused on the circumstances under which simple coal workers' pneumoconiosis can cause a reduction in diffusing capacity, but the doctor failed to explain how diffusing capacity is related to gas exchange impairment. Decision and Order at 7, 9; Employer's Exhibit 4.

The administrative law judge, within a proper exercise of his discretion, gave less weight to the opinions of Drs. Zaldivar and Altmeyer, because he found that their reasoning was less persuasive than that of Dr. Cohen. Decision and Order at 8-9; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge properly rejected employer's argument that Dr. Cohen's opinion was based on generalities rather than claimant's unique condition, as Dr. Cohen specified the evidence of record he relied upon and the supporting medical literature which factored into his conclusion that both

[2] Dr. Rasmussen additionally diagnosed clinical pneumoconiosis based on a positive x-ray and claimant's coal mine employment history, and indicated that the two risk factors for claimant's disabling lung disease were smoking and coal dust exposure. Director's Exhibit 12.

smoking and coal dust exposure caused claimant's impairment, and the physician was not required to apportion the relative contributions of each exposure. Decision and Order at 7-9; Claimant's Exhibit 4. *see Collins*, 21 BLR 1-181; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge thus concluded that the weight of the evidence submitted in support of this subsequent claim established legal pneumoconiosis pursuant to Section 718.202(a)(4), and we affirm this finding as supported by substantial evidence. As employer has identified no other error in the administrative law judge's findings that, considering the new evidence of clinical and legal pneumoconiosis together in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the weight of the evidence established the existence of pneumoconiosis at Section 718.202(a); that pursuant to Section 725.309, claimant proved that one of the conditions for entitlement had changed since the prior denial of benefits; and that, upon a review of all the record evidence, claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(b), we also affirm these findings. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also challenges the administrative law judge's finding that the opinion of Dr. Cohen, that both coal dust exposure and smoking significantly contributed to claimant's disabling impairment, was sufficient to support a finding of disability causation at Section 718.204(c). Based on his weighing of the evidence at Section 718.202(a)(4), however, the administrative law judge properly found disability causation established at Section 718.204(c), *see* Decision and Order at 12-13, and we affirm his findings thereunder as supported by substantial evidence. 20 C.F.R. §718.204(c); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 BLR 2-304, 2-320 n.8 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Consequently, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge