BRB No. 07-0641 BLA

T.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LANCE COAL CORPORATION/GOLDEN OAK MINING COMPANY INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 04/22/2008
R & B FALCON CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonburg, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; 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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2005-BLA-06139) of Administrative Law Judge Donald W. Mosser rendered 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).[1] Based on the parties' stipulation, the administrative law judge credited claimant with thirteen years of coal mine employment. The administrative law judge determined that the weight of the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Because claimant had at least ten years of coal mine employment, the administrative law judge found that claimant was entitled to a presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that the presumption had not been rebutted. The administrative law judge also determined that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Jarboe, on the issue of disability causation at Section 718.204(c), because the doctors did not diagnose pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the award of benefits.

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.[2] 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, 363 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to

[1] Claimant filed his claim for benefits on July 13, 2004. Director's Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on April 27, 2005. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on October 5, 2006.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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, 1-2 (1986) (*en banc*).

Employer's sole contention on appeal is that the administrative law judge erred in finding that claimant satisfied his burden of proving that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).[3] We disagree. The administrative law judge properly considered the three medical opinions of record on the issue of disability causation. Dr. Rasmussen opined that claimant suffered from pneumoconiosis and is totally disabled by a respiratory or pulmonary impairment due, in part, to coal dust exposure. Director's Exhibit 12. Dr. Broudy diagnosed claimant with chronic obstructive pulmonary disease (COPD) and opined that claimant's respiratory disability is due entirely to smoking. Employer's Exhibit 2. Dr. Jarboe also opined that claimant is totally disabled by COPD as a result of his smoking habit and not coal mine employment. Employer's Exhibit 3.

In weighing the conflicting medical opinion evidence at Section 718.204(c), the administrative law judge assigned greatest weight to Dr. Rasmussen's opinion that claimant is totally disabled due to smoking and coal dust exposure because he determined that Dr. Rasmussen's opinion was reasoned and documented. Decision and Order at 9. Citing *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), the administrative law judge gave little weight to the opinions of Drs. Broudy and Jarboe on the issue of disability causation because neither physician diagnosed pneumoconiosis, contrary to the administrative law judge's finding that claimant suffers from the disease.[4] Decision and Order at 9.

---

[3] Employer generally states in the Petition for Review that the administrative law judge erred in finding the existence of coal workers' pneumoconiosis established, but does not provide any argument with respect to the administrative law judge's findings in its supporting brief. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47 (6th Cir. 1986). We therefore affirm, as unchallenged as appeal, the administrative law judge's determination that the weight of the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 15-16.

[4] In *Toler*, the Unites States Court of Appeals for the Fourth Circuit held that, if the administrative law judge determines that a miner suffers from pneumoconiosis or is totally disabled or both, then a medical opinion wherein the miner is determined not to suffer from pneumoconiosis or is not totally disabled "can carry little weight" in assessing the etiology of the miner's total disability "unless the [administrative law

Employer challenges the weight accorded its medical experts, asserting that the administrative law judge erred in finding the opinions of Drs. Broudy and Jarboe less credible because they did not diagnose pneumoconiosis. Employer's Brief at 7-10. Relying on language used by the United States Court of Appeals for the Fourth Circuit in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), employer maintains that the opinions of Drs. Broudy and Jarboe must be deemed credible as to the cause of claimant's total disability, since the physicians found "symptoms consistent with legal pneumoconiosis" and also diagnosed a disabling respiratory impairment. Employer's Brief at 10. Employer's arguments are without merit.

Although the administrative law judge relied on *Toler* as supportive of his credibility determination, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has similarly held that it is proper for an administrative law judge to discount a physician's negative opinion on disability causation when that opinion is based on an erroneous assumption that the miner does not have pneumoconiosis. *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated sub nom.*, *Consolidated 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) (an administrative law judge is instructed "to treat as less significant those physicians' conclusions about causation when they find no pneumoconiosis."). In this case, the administrative law judge determined that the x-ray evidence established the existence of pneumoconiosis, and that finding is not contested by employer. Because Drs. Broudy and Jarboe based their disability causation opinions in whole, or in part, on their determinations that claimant did not have any form of pneumoconiosis, we conclude the administrative law judge reasonably assigned their opinions less weight at Section 718.204(c), in accordance with Sixth Circuit law. *Id*.

Employer also contends that, pursuant to the holdings of the Fourth Circuit in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), the administrative law judge was required to consider the opinions of Drs. Broudy and Jarboe, despite their failure to diagnose pneumoconiosis, since they acknowledged that claimant is totally disabled by a respiratory impairment and found symptoms "consistent with legal

---

judge] can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon [his or] her disagreement with the [administrative law judge's] finding as to either or both of the predicates [pneumoconiosis and total disability] in the causal chain." *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

pneumoconiosis."[5] Employer's Brief at 10. Employer's reliance on *Mays*, *Ballard* and *Hobbs* is misplaced because, unlike the doctors in those cases, who diagnosed only the absence of clinical pneumoconiosis, Drs. Broudy and Jarboe specifically opined that claimant does not suffer from either clinical or legal pneumoconiosis, in direct contradiction of the administrative law judge's finding at Section 718.202(a). *See Scott*, 289 F.3d at 269-70, 22 BLR at 2-383-84. Thus, absent a convincing reason to credit their disability causation opinions, the administrative law judge properly assigned the opinions of Drs. Broudy and Jarboe less weight in comparison to the reasoned and documented opinion of Dr. Rasmussen, that claimant is totally disabled by smoking and coal dust exposure, at Section 718.204(c).[6] *See Skukan*, 993 F.2d at 1233, 17 BLR at 2-104; *Toler*, 3 F.3d at 116, 19 BLR at 2-83. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c), and affirm his award of benefits. *See* 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

[5] Employer notes that Dr. Broudy diagnosed daily cough, shortness of breath and asthma, and that Dr. Jarboe diagnosed chronic bronchitis, asthma, pulmonary emphysema and severe hypoxemia. Employer's Brief at 10. Employer ignores, however, that Drs. Broudy and Jarboe specifically opined that claimant's respiratory condition and his symptoms are not caused by coal dust exposure. Employer's Exhibits 2, 3.

[6] Employer also contends that it was error for the administrative law judge to discount the respective qualifications of the physicians. Employer contends that the administrative law judge erred in failing to consider that Drs. Broudy and Jarboe are Board-certified in pulmonary medicine, while Dr. Rasmussen is Board-certified only in internal medicine. Employer's Brief at 11. Contrary to employer's contention, the administrative law judge specifically noted the credentials of all three physicians and stated that they were each well-qualified. Decision and Order at 7. Moreover, because the administrative law judge properly considered the opinions of Drs. Broudy and Jarboe to be less credible on the issue of disability causation, because they did not diagnose pneumoconiosis, the administrative law judge was not obliged to further discuss the credentials of these physicians.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge