BRB Nos. 08-0558 BLA
and 08-0558 BLA-A

C.C.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/APOGEE	)	
COAL COMPANY	)	DATE ISSUED: 04/16/2009
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Wendy G. Adkins (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

BEFORE: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2007-BLA-5702) of Administrative Law Judge Richard A. Morgan 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). The administrative law judge determined that the claim before him, filed on June 20, 2006, was a subsequent claim pursuant to 20 C.F.R. §725.309 and that claimant's most recent prior claim was

denied because claimant did not establish any of the elements of entitlement.[1] The administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, a change in an applicable condition of entitlement. Upon considering the merits of entitlement, the administrative law judge determined that, although the medical opinion evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the x-ray evidence supported a finding of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found, however, that claimant did not prove that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant contends that the administrative law judge did not properly weigh the opinion in which Dr. Rasmussen diagnosed legal pneumoconiosis under Section 718.202(a)(4) and, as a consequence, erred in determining that claimant failed to establish total disability due to legal pneumoconiosis under Section 718.204(c). Employer has responded and urges affirmance of the denial of benefits. In its cross-appeal, which employer has made contingent upon the Board finding merit in claimant's appeal, employer argues that the administrative law judge did not properly weigh the evidence relevant to Section 718.202(a)(1), (4). Employer also alleges that because total disability was not an element of entitlement previously adjudicated against claimant, the administrative law judge erred in finding that claimant satisfied the requirements of

[1] Claimant filed his first application for benefits on July 8, 1975. Director's Exhibit 1. The district director denied benefits on October 24, 1980, finding that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. *Id*. Claimant filed a second claim on December 7, 1988, which the district director denied on May 9, 1989, on the grounds that claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 2. Claimant filed a third application for benefits on July 8, 2003, which was denied by the district director on March 23, 2004, because claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 3. Claimant filed his fourth claim on June 20, 2006. Director's Exhibit 5. The district director determined that claimant was not entitled to benefits because he did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 30. At claimant's request, the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Richard A. Morgan for a hearing, which was held on June 18, 2007. The administrative law judge issued his Decision and Order Denying Benefits, which is the subject of the present appeal, on April 14, 2008.

Section 725.309(d). The Director, Office of Workers' Compensation Programs, has not filed a response brief in either appeal.[2]

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.[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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from 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. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). 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*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Zaldivar and Crisalli. Dr. Rasmussen examined claimant on September 28, 2006, and based on a negative interpretation of claimant's chest x-ray, determined that he could not render a diagnosis of clinical pneumoconiosis.[4]

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[2] We affirm the administrative law judge's findings that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), but that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), (3), as they have not been challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 6.

[4] Pursuant to 20 C.F.R. §718.201(a)(1):

> 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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

Director's Exhibit 18. Based upon claimant's pulmonary function study, Dr. Rasmussen found that claimant has restrictive lung disease caused, in part, by coal dust exposure. *Id*. Dr. Rasmussen also indicated that the removal of the lower lobe of claimant's left lung, which was performed on May 18, 2005, may be an additional contributing cause. *Id*. Dr. Rasmussen reported that claimant had a pulmonary impairment that rendered him unable to perform "his last regular coal mine job." *Id*. With respect to the extent to which the diagnosed condition contributes to claimant's impairment, Dr. Rasmussen stated:

> There are three definite factors, which could contribute to [claimant's] disabling lung disease. These, of course, include his left lower lobectomy, his previous cigarette smoking as well as his coal mine dust exposure. His restrictive lung disease can be accounted for only in part by his left lower lobectomy. His restriction in lung volumes would be even excessive [sic] for a total pneumonectomy. Coal mine dust could contribute, but does not generally cause significant restriction. Cigarette smoking causes primarily obstructive impairment, but there is only a mild degree of airway obstruction present, although there is evidence of significant small airways disease . . . His coal mine dust exposure, of course, could cause chronic lung disease absent radiographic changes of pneumoconiosis. [Claimant's] coal mine dust exposure must be considered a contributory factor which is significant.

Id. In a subsequent letter to the claims examiner, Dr. Rasmussen reiterated his diagnoses of restrictive lung disease and a totally disabling pulmonary impairment caused, at least in part, by coal dust exposure. *Id*.

At his deposition, which was conducted on February 22, 2007, Dr. Rasmussen testified that significant restrictive lung disease is usually associated with complicated pneumoconiosis or progressive massive fibrosis. Employer's Exhibit 4 at 8-9. Dr. Rasmussen also indicated that claimant's lobectomy played a significant part in causing his disabling pulmonary impairment. *Id*. at 30. Dr. Rasmussen further testified that the reason that claimant suffers from restriction, rather than obstruction is a "mystery," and that legal pneumoconiosis usually causes an obstructive impairment.[5] *Id*. at 31. Dr.

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20 C.F.R. §718.201(a)(1).

[5] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary

Rasmussen added that "it's kind of hard to justify" his diagnosis of legal pneumoconiosis and that he did not have a "good explanation" for claimant's restrictive abnormality. *Id*. at 31-32, 33.

Dr. Zaldivar examined claimant on February 7, 2007 and reviewed a portion of claimant's medical records. Employer's Exhibit 2. Dr. Zaldivar indicated that claimant does not have either clinical or legal pneumoconiosis, but is suffering from a totally disabling pulmonary impairment caused by his lobectomy and cardiac valve disease. *Id*. Dr. Zaldivar was deposed on November 27, 2007 and reiterated his diagnoses. Employer's Exhibit 13.

Dr. Crisalli examined claimant on July 3, 2007. Employer's Exhibit 11. Dr. Crisalli opined that claimant is not suffering from pneumoconiosis. *Id*. Dr. Crisalli further indicated that he could not ascertain whether claimant has a totally disabling pulmonary impairment, as the pulmonary function studies that he obtained were not valid. *Id*. At his deposition, conducted on January 28, 2008, Dr. Crisalli stated that he had reviewed additional objective data concerning claimant's medical condition and determined that claimant has significant cardiac or vascular disease, diabetes, hypertension and hyperlipidemia. Employer's Exhibit 14 at 12-13, 17. Dr. Crisalli also opined that claimant does not have radiological evidence of pneumoconiosis, based upon a CT scan obtained on February 18, 2005. *Id*. at 19-21. Dr. Crisalli concluded that claimant does not have clinical or legal pneumoconiosis. *Id*. at 35-37.

Regarding whether the evidence was sufficient to establish the existence of clinical pneumoconiosis under Section 718.202(a)(4), the administrative law judge accorded the opinions of Drs. Rasmussen and Crisalli "diminished weight." Decision and Order at 30. The administrative law judge determined that both physicians based their findings, that claimant does not have clinical pneumoconiosis, on the absence of x-ray evidence of the disease, a conclusion that is contrary to the administrative law judge's finding at Section 718.202(a)(1). *Id*. The administrative law judge also found that Dr. Crisalli's reliance upon negative biopsy, CT scan and x-ray evidence did not provide an adequate basis for his opinion, as Dr. Crisalli ignored "countervailing evidence" and did not consider that the absence of any reference to clinical pneumoconiosis was not equivalent to an explicit determination that clinical pneumoconiosis was not present. *Id*.

With respect to the existence of legal pneumoconiosis, the administrative law judge weighed the medical opinions of Drs. Rasmussen, Zaldivar and Crisalli pursuant to

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impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Section 718.202(a)(4) and determined that they did not support a finding of the disease. With respect to Dr. Rasmussen's opinion, the administrative law judge stated:

> While Dr. Rasmussen has set forth the observations and facts upon which he based his diagnosis of restrictive lung disease, he has not set forth the observations and facts upon which he determined that the restrictive lung disease was caused in part by coal mine dust, aside from the miner's work history. Dr. Rasmussen fails to adequately explain how coal mine dust exposure caused the restrictive lung disease and instead states in a conclusory manner that coal mine dust exposure has caused the disease. Moreover, in addition to not adequately explaining how he determined that coal mine dust contributed to [c]laimant's restrictive lung disease, Dr. Rasmussen stated several times that significant restrictive abnormalities do not generally occur in cases of minimal pneumoconiosis. After making such statements and asserting such an opinion, Dr. Rasmussen failed to address when and how coal mine dust can cause restrictive impairment with minimal pneumoconiosis and to apply such to [c]laimant's case. During his deposition testimony, Dr. Rasmussen stated that he does not have a good explanation for the cause of the restrictive abnormality and that his diagnosis is difficult to justify. As such, I find Dr. Rasmussen does not explain how the underlying documentation supports his diagnosis, and I do not find his opinion to be well-reasoned.

Decision and Order at 29 (footnote omitted). The administrative law judge also accorded Dr. Rasmussen's diagnosis of legal pneumoconiosis "slightly less weight" than the contrary opinions of Drs. Zaldivar and Crisalli because, unlike these physicians, Dr. Rasmussen is not Board-certified in pulmonary medicine and did not review any objective medical data other than the results of the x-ray and the tests that he obtained during his examination of claimant. *Id*. at 29-30.

The administrative law judge concluded that although the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), it did not detract from his conclusion that the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1). Decision and Order at 29-30. When considering the issue of total disability causation pursuant to Section 718.204(c), the administrative law judge relied upon his discrediting of Dr. Rasmussen's diagnosis of legal pneumoconiosis to determine that claimant failed to prove that pneumoconiosis is a contributing cause of his totally disabling pulmonary impairment.[6] *Id*. at 32-33.

[6] The administrative law judge noted correctly that Drs. Zaldivar and Crisalli opined that claimant's totally disabling pulmonary impairment was not related to either

Claimant argues on appeal that the administrative law judge erred in determining, under Section 718.202(a)(4), that Dr. Rasmussen's diagnosis of legal pneumoconiosis was not well-reasoned. Claimant maintains that because Dr. Rasmussen explained why cigarette smoking and the lobectomy are minor contributing causes of claimant's pulmonary impairment, his identification of coal dust exposure as a significant contributing cause was sufficiently reasoned and documented. Claimant further asserts that the administrative law judge's finding at Section 718.204(c) must also be vacated, as it was based upon his flawed consideration of Dr. Rasmussen's opinion at Section 718.202(a)(4). Claimant's allegations of error are without merit.

The administrative law judge is responsible for engaging in the *de novo* consideration of medical opinion evidence and is granted broad discretion in assessing the credibility of each opinion. *See* 33 U.S.C. 921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §§725.351(b), 725.477; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In so doing, the administrative law judge must consider "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In the present case, the administrative law judge considered these factors and rationally determined that Dr. Rasmussen's diagnosis of legal pneumoconiosis was entitled to little weight, as Dr. Rasmussen acknowledged that he did not have a good explanation for the cause of claimant's restrictive abnormality and that his diagnosis of legal pneumoconiosis was difficult to justify. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Decision and Order at 29; Employer's Exhibit 4 at 31-32, 33.

We affirm, therefore, the administrative law judge's finding with respect to Dr. Rasmussen's opinion and his determination that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). In light of the administrative law judge's permissible discrediting of Dr. Rasmussen's opinion, that claimant's restrictive impairment was related to coal dust exposure, we also affirm his finding that Dr. Rasmussen's opinion was insufficient to establish that legal pneumoconiosis was a contributing cause of claimant's total disability pursuant to

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clinical or legal pneumoconiosis. Decision and Order at 33; Employer's Exhibits 2, 11, 13, 14. As indicated, Dr. Rasmussen did not diagnose clinical pneumoconiosis. Director's Exhibit 18; Employer's Exhibit 4.

Section 718.204(c). *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-352 (4th Cir. 2006); Decision and Order at 33. Thus, we affirm the administrative law judge's finding that claimant did not satisfy his burden of proof at Section 718.204(c) and the administrative law judge's determination that claimant did not establish entitlement to benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; Decision and Order at 33. Because we have affirmed the denial of benefits, we need not address the arguments raised in employer's cross-appeal. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge