

BRB No. 09-0514 BLA

DAVID R. SAKSA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARRISON MINING CORPORATION	)	DATE ISSUED: 04/14/2010
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Erik A. Schramm (Hanlon, Estadt, McCormick & Schramm Co., LPA), St. Clairsville, Ohio, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-5294) of Administrative Law Judge Thomas M. Burke (the administrative law judge), on a claim filed on February 2, 2006, 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). The administrative law judge found that the record supported the parties’ stipulation to twenty years of qualifying coal mine employment. He further found that legal pneumoconiosis was

established at 20 C.F.R. §718.202(a)(4),<sup>1</sup> and that total disability due to pneumoconiosis was established at 20 C.F.R. §718.204(b) and (c). Benefits were, accordingly, awarded.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.<sup>2</sup>

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>3</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

After consideration of the arguments on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the Decision and Order is rational, supported by substantial evidence, consistent with applicable law, and must be affirmed.

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<sup>1</sup> Finding that the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge did not consider whether it also established clinical pneumoconiosis thereunder. Decision and Order at 8-12. The administrative law judge found that clinical pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3).

<sup>2</sup> Because the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) is not sufficiently challenged on appeal, it is affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

In finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4),<sup>4</sup> the administrative law judge noted that all of the physicians who rendered opinions on the issue concluded that claimant had severe chronic obstructive pulmonary disease (COPD). The administrative law judge also noted that claimant's treatment records contained numerous references to COPD. The administrative law judge concluded, however, that while Drs. Altmeyer, Schaaf and Kuziak all attributed claimant's COPD to smoking and coal dust exposure, they disagreed as to "the contribution of each causative factor to [c]laimant's overall impairment." Decision and Order at 8. Specifically, the administrative law judge noted: Dr. Kuziak determined that claimant's impairment was due to both smoking and coal dust exposure,<sup>5</sup> Director's Exhibit 14; Dr. Schaaf also found that claimant's impairment was due to both smoking and coal dust exposure, and that coal dust exposure was a substantial contributing cause of claimant's COPD, Claimant's Exhibits 1, 2; and Dr. Altmeyer opined that claimant's COPD was primarily due to smoking, with only "a minimal contribution from coal dust exposure." Employer's Exhibit 2.

In evaluating these opinions, the administrative law judge accorded little weight to Dr. Altmeyer's opinion because he found that it was not well-reasoned regarding the cause of claimant's COPD/respiratory impairment. Specifically, the administrative law judge determined that Dr. Altmeyer's opinion was not well-reasoned because "Dr. Altmeyer ... admitted that the evidence he relied upon to diagnose smoking as the primary cause of [c]laimant's [respiratory] impairment could also be used to [attribute]

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<sup>4</sup> Legal pneumoconiosis is defined as:

any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(2).

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any 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(2)(b) (emphasis added).

<sup>5</sup> The administrative law judge accorded little weight to Dr. Kuziak's opinion because he failed to explain how smoking and coal dust exposure contributed to claimant's respiratory impairment. This finding is affirmed, as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[c]laimant's impairment to coal dust[,]"<sup>6</sup> Decision and Order at 9. After reviewing Dr. Altmeyer's opinion, we conclude that the administrative law judge permissibly determined that Dr. Altmeyer's opinion was not well-reasoned because Dr. Altmeyer "failed to explain how he [was] able to use the presence of centrilobular emphysema to attribute [c]laimant's impairment primarily to smoking, if it [could] also serve as evidence of a coal dust induced condition." Decision and Order at 9; see *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Anderson*, 12 BLR at 1-112; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge, therefore, permissibly accorded little weight to Dr. Altmeyer's opinion attributing claimant's COPD/respiratory impairment to smoking.

Instead, the administrative law judge accorded determinative weight to the opinion of Dr. Schaaf, attributing claimant's COPD/respiratory impairment to both coal dust exposure and smoking, and noting that coal dust exposure was a "substantially contributing factor to his respiratory impairment," because he found that it was well-reasoned.<sup>7</sup> Decision and Order at 10. Specifically, the administrative law judge noted that Dr. Schaaf explained how there is no difference between obstructive lung disease caused by smoking, versus coal dust exposure, and that "objective tests such as blood gases, lung volumes, and spirometry, are not a means of identifying etiology." Decision and Order at 9. Contrary to employer's argument, Dr. Schaaf was not required to distinguish between the effects of smoking and coal dust exposure, in order to provide a reasoned opinion that claimant's coal dust exposure was a substantially contributing cause of his COPD/respiratory impairment. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007).

The administrative law judge also found Dr. Schaaf's opinion well-reasoned because he reviewed the conclusions drawn by Dr. Altmeyer and persuasively refuted them. Specifically, the administrative law judge noted that Dr. Schaaf questioned Dr. Altmeyer's reliance on the reversibility he saw on claimant's pulmonary function study, after the administration of bronchodilators, to find that coal dust exposure was not a

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<sup>6</sup> The administrative law judge noted that Dr. Altmeyer found, on the one hand, that claimant's physical findings were consistent with *centrilobular emphysema due to smoking*, but that he also "explicitly acknowledged the possibility that *centrilobular emphysema is the same as focal emphysema*," that is "generally seen in individuals with *simple pneumoconiosis*." Decision and Order at 9 (emphasis added).

<sup>7</sup> The administrative law judge noted that Dr. Schaaf's opinion was well-reasoned because it was supported by his findings as a result of claimant's physical examination, objective medical evidence, and exposure histories.

significant contributing factor in causing claimant's COPD/respiratory impairment. The administrative law judge noted that Dr. Schaaf questioned Dr. Altmeyer's opinion on this point because Dr. Altmeyer did not address the cause of the severe residual respiratory impairment that claimant continued to have after the administration of bronchodilators. The administrative law judge, therefore, rationally found that Dr. Schaaf's opinion was better reasoned than Dr. Altmeyer's opinion, in part, because he persuasively refuted one of the bases for Dr. Altmeyer's opinion. See *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Consolidation Coal Co. v. Swiger*, BRB No. 03-1971 (4th Cir. 2004) (unpub.); *Anderson*, 12 BLR at 1-112; *Clark*, 12 BLR at 1-155.

Further, contrary to employer's contention, Dr. Schaaf's reference, in his report, to a letter from claimant's attorney, does not establish that his opinion is biased. Reports prepared in the course of litigation are probative evidence and are not presumptively biased. *Richardson v. Perales*, 401 U.S. 389 (1971); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992). Moreover, the fact that Dr. Schaaf was the only physician to read an x-ray as positive and that he failed to conduct a blood gas study and refer to medical literature does not render his opinion on the issue of legal pneumoconiosis unreasoned. See *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Accordingly, the administrative law judge permissibly accorded determinative weight to Dr. Schaaf's opinion that coal dust exposure was a substantial contributing cause of claimant's COPD.

In addition, we note that the administrative law judge permissibly found that the opinions of Drs. Looby and Sanchez, treating physicians whose opinions were contained in claimant's treatment records, were not probative on the issue of legal pneumoconiosis, as their failure to diagnose the disease was not conclusive proof of the absence of the disease. See *Anderson*, 12 BLR at 1-112; see also *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002). Likewise, the administrative law judge permissibly found that their "passing reference" to claimant's smoking history was not sufficient to establish that claimant's COPD was, in fact, due to smoking. See 20 C.F.R. §718.201(b).

In sum, therefore, we hold that the administrative law judge properly evaluated the medical opinion evidence and properly found that it established legal pneumoconiosis at Section 718.202(a)(4) on the basis of Dr. Schaaf's opinion.

Turning to the issue of disability causation at Section 718.204(c), the administrative law judge considered the opinions of Drs. Schaaf and Altmeyer, the only physicians to address disability causation.<sup>8</sup> The administrative law judge properly accorded determinative weight to the opinion of Dr. Schaaf, that claimant's pneumoconiosis was a substantially contributing cause of disability, because it was well-reasoned and well-documented. *See Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-112. The administrative law judge properly accorded little weight to the opinion of Dr. Altmeyer that claimant's "smoking alone [was] sufficient to produce [c]laimant's disability," because Dr. Altmeyer did not, contrary to the administrative law judge's own determination at Section 718.202(a)(4), find legal pneumoconiosis. *See Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). We, therefore, affirm the administrative law judge's finding that disability causation was established at Section 718.204(c).

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<sup>8</sup> The administrative law judge found that the opinion of Dr. Kuziak was not relevant to Section 718.204 because Dr. Kuziak did not sufficiently address the issue of total disability. Decision and Order at 12. This finding is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

Accordingly, we affirm the administrative law judge's Decision and Order - Awarding Benefits.<sup>9</sup>

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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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>9</sup> In light of the foregoing, we hold that application of the recent amendments to the Act, which became effective on March 23, 2010, would not alter the outcome of this case.