BRB No. 11-0498 BLA

CURTIS M. KISER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L & J EQUIPMENT COMPANY	)	DATE ISSUED: 04/25/2012
	)	
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 on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

Employer appeals the Decision and Order on Remand Awarding Benefits (2008-BLA-5837) of Administrative Law Judge Linda S. Chapman, rendered on a subsequent claim[1] filed on May 21, 2001,[2] pursuant to the provisions of the Black Lung Benefits Act,

[1] Claimant's initial claim for benefits, filed on October 29, 1979, was denied for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1.

[2] Congress recently enacted amendments to the Act, which became effective on March 23, 2010, and apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556,

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 is before the Board for the third time. The relevant procedural history is as follows. Claimant was initially awarded benefits on his subsequent claim by Administrative Law Judge Pamela Lakes Wood on June 8, 2005. Pursuant to employer's appeal, the Board affirmed Judge Wood's findings that claimant established twenty-six years of coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Kiser v. L&J Equipment Co.*, 23 BLR 1-246, 1-249-250 nn.2, 3 (2006). However, the Board vacated the award of benefits because Judge Wood did not properly weigh the conflicting medical opinions of Drs. Rasmussen, Rosenberg and Fino, when finding that claimant established the existence of legal pneumoconiosis[3] at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 1-250-256. Thus, the Board remanded the case for further consideration.

By Order dated April 13, 2007, Judge Wood determined that the record was insufficient to permit her to comply with the Board's instructions and she remanded the case to the district director. Following additional evidentiary development, a Proposed Decision and Order awarding benefits was issued by the district director on April 30, 2008. Director's Exhibit 12. The case was then returned to the Office of Administrative Law Judges and assigned to Judge Chapman (the administrative law judge). In a Decision and Order Awarding Benefits, issued on July 1, 2009, the administrative law judge found that Dr. Fino did not provide a reasoned opinion regarding the presence or absence of pneumoconiosis. The administrative law judge assigned controlling weight to Dr. Rasmussen's opinion, that claimant is totally disabled due to pneumoconiosis, over the contrary opinion of Dr. Rosenberg, that claimant's respiratory disability is unrelated to coal dust exposure, because she found that Dr. Rosenberg expressed views that were contrary to the science relied upon by the Department of Labor (DOL) in promulgating the revised definition of legal pneumoconiosis. Relying on Dr. Rasmussen's opinion, the administrative law judge found that claimant established that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

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124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The amendments are not applicable to this claim, as it was filed prior to January 1, 2005.

[3] Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) 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(a)(2).

Employer appealed, and the Board affirmed, the administrative law judge's finding that Dr. Rosenberg's opinion, relevant to 20 C.F.R. §718.202(a)(4), was at odds with DOL's position that coal dust exposure can cause centrilobular emphysema. *Kiser v. L&J Equipment Co.*, BRB No. 09-0763 BLA (Aug. 31, 2010) (unpub.). However, the Board agreed with employer that the administrative law judge erred in not addressing the specific issues identified by the Board in its 2006 decision, which pertained to the credibility of Dr. Rasmussen's opinion. Thus, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(c) and remanded the case for further consideration.

In her Decision and Order on Remand, issued on March 16, 2011, the administrative law judge explained that she found Dr. Rasmussen's opinion to be reasoned, documented and credible as to the etiology of claimant's disabling respiratory condition, despite any inconsistent statements that appeared in his report. The administrative law judge determined that Dr. Rasmussen's opinion was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Weighing all of the evidence together at 20 C.F.R. §718.202(a), the administrative law judge found that claimant satisfied his burden to prove that he has pneumoconiosis. The administrative law judge further found, based on Dr. Rasmussen's opinion, that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion. Claimant responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal, unless specifically requested to do so by the Board. Employer has also filed a reply brief, reiterating its arguments.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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 prove that he suffers from pneumoconiosis, that the

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6.

pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The sole issue in this appeal is whether Dr. Rasmussen's opinion is sufficient to satisfy claimant's burden to establish his entitlement to benefits. Based on our review of the administrative law judge's Decision and Order on Remand, the briefs of the parties and Dr. Rasmussen's report, we conclude that substantial evidence supports the administrative law judge's award of benefits.

The Board remanded the case for the administrative law judge to address Dr. Rasmussen's statement, that the "only known risk factor for [claimant's] disabling lung disease is his coal mine dust exposure," even though the physician noted in his report that claimant had pneumonia twice in 2001 and received significant exposure to sand dust, while working at a foundry. Director's Exhibit 50; *see Kiser*, BRB No. 09-0763 BLA, slip op. at 8. In addition, the Board instructed the administrative law judge to address the significance, if any, of Dr. Rasmussen's statement that, "the possibility of a right to left shunt associated with pulmonary hypertension is not excluded." *Id*.

The administrative law judge determined that Dr. Rasmussen's opinion was not inconsistent and explained:

> Dr. Rasmussen's reports clearly reflect that he noted that [claimant] had pneumonia twice in 2001, and that he had significant past exposure to sand dust. What the record, including Dr. Rasmussen's reports, does NOT include, is any evidence that pneumonia or sand dust is a "risk factor" for pneumoconiosis, or the form of disabling lung impairment identified by Dr. Rasmussen, manifested by a pattern of marked impairment in oxygen transfer, decreased diffusing capacity, and marked exercise hypoxia. In order to conclude that there was an "inconsistency" in Dr. Rasmussen's conclusions, in that he did not "consider" this information, I would have to substitute my medical opinion for Dr. Rasmussen's, and conclude that these exposures were "risk factors" for the development of pneumoconiosis, or the form of disabling lung impairment identified by Dr. Rasmussen. Clearly Dr. Rasmussen was aware of these exposures; just as clearly, he did not include them among [claimant's] "risk factors" for the development of pneumoconiosis or the form of disabling lung impairment that Dr. Rasmussen identified.

> * * *
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> As there is no basis in the record for me to assume that pneumonia and sand dust exposure were "risk factors" for [claimant], and I am not a physician, I will not do so.

Decision and Order on Remand at 4.

The administrative law judge further determined that Dr. Rasmussen's diagnosis of pneumoconiosis was supported by a "thorough and detailed discussion of his findings" and that his opinion was "well documented by the medical records." Decision and Order on Remand at 6. Moreover, the administrative law judge noted that "Dr. Rasmussen's credentials are impressive, and reflect a career devoted to the study of the effects of coal mine dust exposure, as well as the treatment of coal miners with respiratory disease."[5] *Id*.

Employer asserts that the administrative law judge has employed the same rationale on remand with respect to Dr. Rasmussen's opinion. Employer's argument is rejected. On remand, the administrative law judge drew rational inferences, explained her findings and permissibly exercised her discretion, as the trier of fact, in crediting Dr. Rasmussen's opinion, relevant to the issues of the existence of pneumoconiosis and disability causation. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). The administrative law judge permissibly concluded that Dr. Rasmussen's opinion was reasoned and documented and that his opinion was reliable, based on his credentials. *See Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (en banc); *Dillon v. Peabody Coal Co*., 11 BLR 1-113 (1988). Because the Board is not empowered to reweigh the evidence, nor substitute its inferences for those of the administrative law judge, we reject employer's assertions of error and affirm the administrative law judge's finding that Dr. Rasmussen's opinion is sufficient to satisfy claimant's burden to establish the existence of legal pneumoconiosis at 20 C.F.R.

[5] The administrative law judge also addressed Dr. Rasmussen's statement that "[t]he possibility of a right and left shunt is not excluded." Director's Exhibits 10, 11, 50. The administrative law judge "interpret[ed] this to mean that, while Dr. Rasmussen could not rule out a possible right to left shunt associated with pulmonary hypertension, [claimant's] coal dust exposure, which was consistent with his pattern of impairment, nevertheless was the only known cause of his respiratory impairment." Decision and Order on Remand at 4-5.

§718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding 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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BETTY JEAN HALL
Administrative Appeals Judge