BRB No. 13-0375 BLA

KENNETH GREGORY	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
PEN COAL CORPORATION	)	DATE ISSUED: 04/25/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 in a Subsequent Claim of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

James Holliday, Hazard, Kentucky, for claimant.

Ashley M. Harman and Jeffrey R. Soukup (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2011-BLA-05488) of Administrative Law Judge Peter B. Silvain, Jr., on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944

(2012)(the Act).[1] The administrative law judge found that, although claimant established at least twenty-five years of surface coal mine employment, he was unable to invoke the presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he did not establish that the conditions in his surface coal mine employment were substantially similar to those in underground mining.[2] The administrative law judge found that the medical evidence developed since the denial of claimant's previous claim was sufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the claim on its merits, the administrative law judge determined that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), in the form of chronic obstructive pulmonary disease (COPD) and chronic industrial bronchitis due to coal mine dust exposure. The administrative law judge further found that total disability and disability causation were established 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 finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and further challenges the administrative law judge's finding that claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[3]

[1] Claimant's first application for benefits was withdrawn. Claimant filed a second application for benefits on April 7, 2005. Director's Exhibit 1. Administrative Law Judge Donald W. Mosser denied benefits on July 18, 2008, as claimant did not establish any of the elements of entitlement. *Id*. Claimant took no further action until filing the present subsequent claim on December 23, 2009. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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 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).

Legal Pneumoconiosis – 20 C.F.R. §718.202(a)(4)

The administrative law judge initially noted that Drs. Ammisetty, Baker and Stark opined that claimant has legal pneumoconiosis,[5] whereas Drs. Tuteur, Zaldivar and Crisalli attributed claimant's pulmonary impairment to smoking, obesity and the traumatic injuries that claimant's lungs received in a car accident. Decision and Order at 37. The administrative law judge accorded little weight to the opinions of Drs. Ammisetty and Crisalli, as their conclusions were not supported by the objective evidence of record. *Id.*; Director's Exhibits 1, 12; Employer's Exhibits 1, 8. The administrative law judge found that Dr. Baker's diagnosis of legal pneumoconiosis was entitled to less weight because he did not fully address the extent to which claimant's tracheomalacia[6] and tracheal stent affect his pulmonary impairment. Decision and Order at 38; Director's Exhibit 14; Claimant's Exhibit 5. With respect to Dr. Zaldivar's

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4; *see also* Decision and Order at 23; Hearing Transcript at 21-22.

[5] Legal pneumoconiosis is "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary arising out of coal mine employment." *Id*. The phrase "arising out of coal mine employment" means "any chronic respiratory or pulmonary disease or impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] "Tracheomalacia" is the softening of the cartilage of the trachea. Dorland's Illustrated Medical Dictionary (31st ed. 2007).

opinion, the administrative law judge found that it was "based on the faulty premise that the [c]laimant does not suffer from any obstruction," and gave it "less weight." Decision and Order at 38; Employer's Exhibits 1, 2. The administrative law judge determined that Dr. Tuteur's opinion was entitled to little weight, as he "espoused the erroneous view that the risk of developing clinically meaningful airways obstruction from smoking compared to coal dust inhalation is twenty to one." Decision and Order at 38; Employer's Exhibits 3, 4. Based on his finding that Dr. Stark's opinion, diagnosing legal pneumoconiosis, was well-reasoned and well-documented, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis. Decision and Order at 39; Director's Exhibits 1, 2; Employer's Exhibit 10.

Employer contends that the administrative law judge "fail[ed] to comply" with the requirements of the Administrative Procedure Act,[7] as he did not provide an adequate rationale for crediting Dr. Stark's opinion in light of the physician's failure to identify the specific bases for his conclusions. Employer's Brief at 7. Employer also contends that the administrative law judge did not apply the degree of scrutiny to Dr. Stark's opinion that he applied to the opinions of employer's physicians, and asserts that Dr. Stark's opinion is cursory, unexplained, and not well-reasoned. Employer's Brief at 16-17. Employer further maintains that the administrative law judge erred in discrediting the opinions of Drs. Tuteur and Crisalli. Employer's allegations of error are without merit.

The determination of whether a physician's report is adequately reasoned and documented is essentially a credibility matter left to the discretion of the fact-finder. *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). In the present case, the administrative law judge noted correctly that Dr. Stark acknowledged that claimant is suffering from tracheomalacia, "which no physician has indicated could be related in any way to coal dust exposure," but also diagnosed COPD/industrial bronchitis caused by coal dust exposure, and stated that the latter condition made claimant's tracheomalacia worse. Decision and Order at 39; Director's Exhibit 1. The administrative law judge then rationally determined that Dr. Stark's diagnosis was consistent with the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge also acted within his discretion in finding that Dr. Stark's opinion was consistent with the comment made by the Department of Labor (DOL) in the preamble to the 2001 revised regulations that coal dust exposure can cause clinically significant obstructive lung disease. 65 Fed. Reg.

[7] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

79,920, 79,943 (Dec. 20, 2000); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Finally, the administrative law judge permissibly found that Dr. Baker's analysis supported Dr. Stark's diagnosis of industrial bronchitis, based on Dr. Baker's diagnosis of COPD caused by smoking and coal dust exposure, and his statements that these causal factors have a synergistic effect and the extent to which each contributes cannot be identified with certainty. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Looney*, 678 F.3d at 314, 25 BLR at 2-130; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003).

The administrative law judge reasonably concluded, therefore, that Dr. Stark's opinion diagnosing legal pneumoconiosis was well-reasoned and well-documented. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Accordingly, we affirm the administrative law judge's finding.

Regarding the administrative law judge's consideration of Dr. Tuteur's opinion, we affirm his decision to give it less weight because Dr. Tuteur's view, that coal dust exposure rarely causes obstruction in miners who smoked, conflicts with the DOL's position that the medical literature establishes that smoking and nonsmoking miners are equally at risk for developing COPD. 65 Fed Reg. 79,920, 79,939 (Dec. 20, 2000); *see Looney*, 678 F.3d at 314, 25 BLR at 2-130; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). The administrative law judge also rationally found that Dr. Crisalli's failure to definitively diagnose a restrictive defect, contrary to the physicians who submitted the most recent medical opinions of record, made his opinion ruling out the presence of legal pneumoconiosis less credible as the definition of the disease encompasses both obstructive and restrictive impairments arising out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2), (b); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

In light of the discretion given to the administrative law judge, as trier-of-fact, to determine the weight and credibility of the medical experts, *see Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76, and to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), we affirm the administrative law judge's finding that Dr. Stark's opinion is more persuasive than the opinions of Drs. Tuteur and Crisalli. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We, therefore, affirm the administrative law judge's finding that claimant established the existence of legal

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), based upon Dr. Stark's opinion, as corroborated by Dr. Baker's opinion.[8]

Total Disability Causation – 20 C.F.R. §718.204(c)

We further affirm the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis, based on the administrative law judge's finding that Dr. Stark's opinion is best supported by the underlying documentation in this case. *See Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192. Because the administrative law judge found the evidence sufficient to establish legal pneumoconiosis, a finding contrary to the opinions of Drs. Tuteur and Crisalli, the administrative law judge permissibly accorded determinative weight to the opinion of Dr. Stark in finding disability causation established at 20 C.F.R. §718.204(c).[9] *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

[8] The administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) subsumed a finding that the legal pneumoconiosis arose out of coal mine employment, as required under 20 C.F.R. §718.203. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159 n.18 (2006).

[9] Because we have affirmed the administrative law judge's award of benefits, we decline to address claimant's argument that he was entitled to benefits based on the application of the amended Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge