BRB No. 13-0414 BLA

LYNN BISHOP KING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRASURE CREEK MINING, LLC, d/b/a TRINITY COAL COMPANY	)	DATE ISSUED: 04/09/2014
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE 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 of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5785) of Administrative Law Judge John P. Sellers, III rendered on a claim filed on December 29, 2009, pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge accepted the parties' stipulation that claimant had thirty-five years of above ground coal mine employment. The administrative law judge found, however, that claimant was not entitled to the rebuttable presumption of total disability due to pneumoconiosis, because he failed to establish that at least fifteen years of his coal mine employment were spent in conditions substantially similar to those in an underground mine. *See* 30 U.S.C. §921(c)(4)(2012).[1] Turning to whether entitlement was established pursuant to 20 C.F.R. Part 718, the administrative law judge found that, although claimant failed to establish the existence of clinical pneumoconiosis, he established the existence of legal pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a).[3] Further, the administrative law judge found that claimant established that he is totally disabled pursuant to 20 C.F.R. §718.204(b), and that his total disability is due to pneumoconiosis arising out of coal mine employment pursuant to 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 finding the existence of legal pneumoconiosis and disability causation established pursuant to Sections 718.202(a) and 718.204(c).[4] In response to employer's appeal, claimant and the

[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of Public Law No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(2012). The amendments provide, in pertinent part, that 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)(2012).

[2] Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R §718.201(a)(2).

[3] A finding that pneumoconiosis is caused by coal mine employment is subsumed in the finding of legal pneumoconiosis. *See* 20 C.F.R §§718.201, 718.202, 718.203.

[4] Employer also contends generally that the administrative law judge erred in finding total disability established pursuant to 20 C.F.R. §§718.204(b). Employer fails, however, to allege any specific error in the administrative law judge's total disability finding. That finding is, therefore, affirmed. *See Fish v. Director, OWCP*, 6 BLR 1-107

Director, Office of Workers' Compensation Programs (the Director), urge the Board to affirm the administrative law judge's 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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 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 the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director*, OWCP, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

Legal Pneumoconiosis

Addressing the medical opinion evidence regarding the existence of legal pneumoconiosis, the administrative law judge reviewed the reports of Drs. Baker,[6] Zaldivar,[7] and Rosenberg.[8] The administrative law judge found that Dr. Baker opined

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(1983).

[5] We will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 3.

[6] Dr. Baker performed a pulmonary examination on February 8, 2012, and diagnosed chronic obstructive pulmonary disease with moderate obstructive ventilatory defect, ischemic heart disease, status post-coronary artery bypass grafting, and essential hypertension. He diagnosed chronic obstructive pulmonary disease and, in view of the additive nature of claimant's smoking and coal dust exposure, determined that it was caused, at least, in part by his coal dust exposure. He opined that claimant's pulmonary function testing demonstrated that he is unable to perform his previous coal mine employment as a mechanic. Decision and Order at 16-17, 24-26, 29-30, 32-33; Claimant's Exhibit 1.

[7] Dr. Zaldivar examined claimant on November 20, 2010, and diagnosed a mild irreversible obstruction and mild restriction of vital capacity. He found this was a result of trauma from previous cardiac surgery preventing proper inflation of the lungs due to scarring, unrelated to claimant's coal mine employment. He opined that claimant does

that claimant's respiratory impairment was due to both smoking and coal mine employment. The administrative law judge found that Drs. Zaldivar and Rosenberg opined that claimant does not have "legal pneumoconiosis." Decision and Order at 23. The administrative law judge determined that Dr. Baker's opinion was based on validated pulmonary function studies and "essentially accurate" coal mine employment and smoking histories. *Id*. at 24-27, 31. He further determined that Dr. Baker "proffered reasons" in support of his opinion, consisting of statements regarding "the deleterious combined effect of cigarette smoking and coal mine dust." *Id*. at 29. Specifically, the administrative law judge found that Dr. Baker's opinion was "consistent with the official [Department of Labor] position that their effect is additive and puts the miner who smokes at additional risk for clinically significant obstructive lung disease." *Id*. He therefore credited Dr. Baker's opinion as supportive of a finding of legal pneumoconiosis.

In contrast, the administrative law judge found that Dr. Zaldivar offered "no reason for attributing the [c]laimant's obstructive impairment entirely to his smoking other than the length and early start of his smoking history." *Id*. Thus, the administrative law judge faulted Dr. Zaldivar's opinion for failing to adequately address the possible contributory or aggravating effect of claimant's thirty-five years of coal mine employment on claimant's obstructive respiratory impairment. The administrative law judge discounted Dr. Rosenber'g opinion because it was based on an early pulmonary function study that did not show a significant obstructive impairment. The administrative law judge noted that Dr. Rosenberg did not review the most recent pulmonary function studies demonstrating a respiratory impairment.[9] Thus, the administrative law judge

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not have either clinical or legal pneumoconiosis and that his obstructive impairment is due entirely to smoking and the effects of aging. Decision and Order at 12-13, 17-18, 26-28, 29, 31-33; Director's Exhibit 30; Employer's Exhibit 6.

[8] Dr. Rosenberg examined claimant on January 18, 2011, and diagnosed a mild degree of restriction with some mild improvement after bronchodilators, and believed it "likely" that claimant lacked any significant lung disease. He diagnosed a degree of hyperactive airways disease that was not coal mine related, and opined that claimant did not have either clinical or legal pneumoconiosis. He opined that claimant's underlying coronary artery disease was not related to his previous coal mine work, and that his pulmonary function testing showed that, from a pulmonary perspective, he could perform his previous coal mine work. Decision and Order at 14-16, 27-29, 32, 33; Employer's Exhibits 1, 4.

[9] The administrative law judge found that "the problem" with Dr. Rosenberg's opinion is that it "predates the new pulmonary function studies." Decision and Order at 32.

concluded that Dr. Rosenberg's opinion was "not particularly probative." *Id*. at 26-29. The administrative law judge therefore found the existence of legal pneumoconiosis established pursuant to Section 718.202(a), based on the better reasoned opinion of Dr. Baker.[10]

It is the role of the finder-of-fact to evaluate the medical evidence, draw inferences, assess the probative value of the evidence, and ascertain compliance with the premises underlying the Act and relied on by the Department of Labor (DOL) in promulgating implementing regulations. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR at 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(en banc).

Contrary to employer's contentions, substantial evidence supports the administrative law judge's determination that Dr. Baker's opinion was better reasoned than the opinions of Drs. Zaldivar and Rosenberg. It was rational for the administrative law judge to credit the more recent evidence when that evidence showed that claimant's condition has progressed or worsened. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993) *citing Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992)*; see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). Therefore, contrary to employer's contention, the administrative law judge properly assigned greater weight to the opinion of Dr. Baker because it was based on the most recent testing of record. Decision and Order at 32-33; Director's Response at 2. Further, the regulatory standards do not require post-bronchodilator pulmonary function testing. Thus, contrary to employer's contention, the administrative law judge was not required to discount Dr. Baker's opinion because he did not conduct post-bronchodilator pulmonary function testing.[11] *See Consolidation Coal*

[10] The administrative law judge discounted the opinion of Dr. Rasmussen diagnosing legal pneumoconiosis because it was based on consideration of claimant's qualifying blood gas studies, without considering claimant's non-qualifying blood gas studies. Decision and Order at 24, 29. The administrative law judge excluded the opinion of Dr. Vuskovich pursuant to 20 C.F.R. §725.414. *Id*. at 19. As these findings have not been challenged by the parties on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1986).

[11] Moreover, as the administrative law judge observed, even if Dr. Baker had performed a post-bronchodilator study, and it had demonstrated some degree of reversiblity, Dr. Zaldivar provided "no persuasive reason" for attributing "all of [claimant's] fixed non-reversible impairment" to smoking. *See Consolidation Coal Co.*

Co. v. Director, OWCP [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Lastly, we reject employer's contention that the opinion of Dr. Baker was improperly credited over those of Drs. Zaldivar and Rosenberg because the latter physicians were both "[B]oard[-]certified pulmonary specialists." Employer's Brief at 11. In weighing the opinions, the administrative law judge correctly noted that Drs. Baker, Zaldivar and Rosenberg were all Board-certified pulmonologists. Decision and Order at 27. Contrary to employer's contention, the administrative law judge was not required to find that the opinions of Drs. Zaldivar and Rosenberg outweighed the opinion of Dr. Baker based on their numerical superiority. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

The administrative law judge correctly identified deficiencies in the underlying documentation and rationales of Drs. Zaldivar and Rosenberg, and permissibly concluded that their medical opinions were flawed. In contrast, the administrative law judge permissibly found that the rationale advanced by Dr. Baker comported with the scientific studies and conclusions relied upon by the DOL. *See* Decision and Order at 29-31. Resolving the evidentiary conflicts in the medical experts' opinions based on their underlying rationales, the administrative law judge validly credited Dr. Baker's diagnosis of a chronic obstructive pulmonary disease due to both coal dust exposure and smoking, to find legal pneumoconiosis established. 65 Fed. Reg. 79,940-43 (Dec. 20, 2000); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. The administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a) is rational and supported by substantial evidence. It is, therefore, affirmed. Decision and Order at 29; *see Moseley v. Peabody Coal Co*., 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987).

Disability Causation

In finding disability causation established pursuant to Section 718.204(c),[12] the administrative law judge credited the opinion of Dr. Baker, who found that claimant's

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v. Director, OWCP [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); Decision and Order at 27.

[12] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

disability was due to both smoking and coal mine employment. The administrative law judge discounted the contrary opinions of Drs. Zaldivar and Rosenberg because, contrary to his own finding, they did not diagnose the existence of legal pneumoconiosis. The administrative law judge accorded little weight to Dr. Zaldivar's opinion because Dr. Zaldivar attributed claimant's disability to "smoking and the possible effects of aging without providing any convincing basis for excluding the [c]laimant's coal dust exposure as at least a contributing cause." Decision and Order at 27. Further, the administrative law judge accorded less weight to the opinion of Dr. Rosenberg because he failed to consider the most recent pulmonary function studies, which showed that claimant had a disabling respiratory impairment. Thus, the administrative law judge found disability causation established, based on the better reasoned opinion of Dr. Baker.

Contrary to employer's contention, the administrative law judge did not err in discounting the opinions of Drs. Zaldivar and Rosenberg because, contrary to his own finding, they did not diagnose the existence of legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Also, the administrative law judge did not err in discounting Dr. Zaldivar's causation opinion because he attributed claimant's disabling respiratory impairment entirely to age and smoking, but failed to account for the effects of coal dust exposure. Decision and Order at 33; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2004). Further, the administrative law judge did not err in discounting Dr. Rosenberg's opinion because he was unaware of all of claimant's pulmonary function studies. Decision and Order at 33. The administrative law judge, therefore, permissibly discounted the opinions of Drs. Zaldivar and Rosenberg. *Id*. at 32-32; *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610-611, 22 BLR 2-288, 2-303 (6th Cir. 2001); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(en banc). In contrast, the administrative law judge properly credited the opinion of Dr. Baker because Dr. Baker fully explained how both smoking and coal mine employment contributed to claimant's total disability. *See Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *Gross*, 23 BLR at 1-19-20; *Clark*, 12 BLR at 1-155.

Based on the foregoing, we conclude that employer's assignments of error, challenging the administrative law judge's credibility determinations, are essentially a request to reweigh the evidence, which is an exercise beyond our scope of review. *See*

> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As substantial evidence supports the administrative law judge's findings at Sections 718.202(a) and 718.204(c), we affirm them and further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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