BRB No. 06-0823 BLA

JOHN R. ROBINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/27/2007
	)	
CYPRUS CUMBERLAND RESOURCES, LP	)	
	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (05-BLA-5543) of Administrative Law Judge Richard A. Morgan 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 credited claimant with forty years of coal mine employment[1] and found that the evidence established the existence of

[1] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction

pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b), in the form of obstructive lung disease due to coal dust exposure. The administrative law judge further found that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of the miner's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

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. 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).

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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer initially contends that the administrative law judge erred in finding the medical opinion evidence, consisting of the reports of Drs. Garson, Levine, and Fino, sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, employer contends that the administrative law judge erred in crediting the opinion of Dr. Garson, which employer asserts is not sufficiently reasoned to carry

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of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's finding of forty years of coal mine employment, and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

claimant's burden of proof. Employer's Brief at 9-10. We disagree. Dr. Garson diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD) due to coal dust exposure, and emphysema due to a combination of coal dust exposure and smoking. Director's Exhibit 13. Contrary to employer's assertions, the administrative law judge permissibly found that because Dr. Garson based his opinion on claimant's employment and smoking histories, physical findings on examination, and the x-ray, pulmonary function, and blood gas study results, his opinion that claimant has COPD due to coal dust exposure was reasoned and documented, and sufficient to support a finding of legal pneumoconiosis. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 13-14. Furthermore, the administrative law judge was not required to accord less weight to Dr. Garson's diagnosis of legal pneumoconiosis, simply because the physician also diagnosed clinical pneumoconiosis, contrary to the administrative law judge's own finding. The Act and its implementing regulations recognize both "clinical" and "legal" pneumoconiosis, and an administrative law judge may find the weight of the evidence insufficient to establish the existence of one form of pneumoconiosis, but sufficient to establish the other. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-103 (1998)(*en banc*).

Employer next challenges the administrative law judge's crediting of Dr. Levine's opinion. Employer contends that Dr. Levine failed to provide an etiology for his diagnosis of obstructive lung disease, and, therefore, his opinion is insufficient to support a finding of legal pneumoconiosis. Employer's Brief at 12. Employer's contention has no merit. Reviewing Dr. Levine's opinion, the administrative law judge noted that in an initial report dated August 24, 2004, Dr. Levine opined that claimant had worked in the coal mines for forty years, and as a result of his exposure to coal and sand dust, had developed significant shortness of breath. Decision and Order at 14. The administrative law judge further noted, correctly, that Dr. Levine diagnosed pneumoconiosis, based on x-ray, and obstructive lung disease based on abnormal pulmonary function study results, and concluded that claimant is totally and permanently disabled, and that "[h]is condition is due to his total cumulative exposure to coal dust and sand dust during his occupational experience." Decision and Order at 14; Claimant's Exhibit 1. Thus, contrary to employer's argument, as Dr. Levine linked both claimant's pneumoconiosis and his obstructive lung disease to coal dust exposure, the administrative law judge reasonably concluded that Dr. Levine's opinion constitutes a diagnosis of legal pneumoconiosis. *Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004).

The administrative law judge also noted that in a supplemental report, dated September 11, 2004, Dr. Levine additionally diagnosed progressive massive fibrosis based on a 1993 chest x-ray he reviewed. Decision and Order at 14; Claimant's Exhibit 3. While the administrative law judge permissibly declined to credit Dr. Levine's

diagnosis of progressive massive fibrosis, as unsupported by the weight of the medical evidence of record, the administrative law judge acted within his discretion in crediting Dr. Levine's primary diagnosis of obstructive lung disease due to coal dust exposure, as reasoned and documented, and consistent with claimant's extensive history of coal mine employment and abnormalities found on clinical testing.[3] *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; Decision and Order at 10, 14.

Finally, we reject employer's argument that the administrative law judge erred in his evaluation of Dr. Fino's opinion. Employer's Brief at 13. Dr. Fino diagnosed COPD with bullous emphysema, and stated that in 1993, claimant had a "mild reduction in his lung function that is irreversible that could be due to smoking and also certainly could be due to coal mine dust inhalation." Employer's Exhibit 5. Dr. Fino further stated that more recent testing in 2005 revealed that "there is still a portion of his lung function that is reduced and may be related to coal mine dust inhalation." Employer's Exhibit 5. Employer states that as Dr. Fino's etiology opinion is speculative, it is "insufficient to shoulder the claimant's burden of proof to establish the existence of pneumoconiosis by a preponderance of the evidence." Employer's Brief at 14. Contrary to employer's assertion, the administrative law judge did not rely on Dr. Fino's diagnosis to support his finding of legal pneumoconiosis. Rather, the administrative law judge simply concluded that Dr. Fino's opinion, while equivocal, "suggests that Claimant may suffer from legal pneumoconiosis." Decision and Order at 14.

As the administrative law judge properly analyzed the medical opinions and explained his reasons for crediting or discrediting the opinions he reviewed, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The administrative law judge is tasked with evaluating the physicians' opinions, s*ee Kertesz*, 788 F.2d at 163, 9 BLR at 2-8, and the Board will not substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113. Finally, the administrative law judge considered all of the evidence pertinent to the existence of pneumoconiosis together, and permissibly concluded that claimant established the existence of legal pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Decision and Order at 14.

[3] As the administrative law judge declined to credit Dr. Levine's September 11, 2004 supplemental report, we need not address employer's additional contention that it is based on a chest x-ray not contained in the record, and therefore, is not in conformance with the evidentiary limitations at 20 C.F.R. §725.414.

Employer next challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.204(c), that the medical evidence of record establishes that the miner's totally disabling respiratory impairment is due to pneumoconiosis. A miner is totally disabled due to pneumoconiosis if pneumoconiosis:

> 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
> (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); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003). A physician's unequivocal opinion that pneumoconiosis is one of two causes of a miner's totally disabling respiratory impairment is legally sufficient to establish that pneumoconiosis is a "substantially contributing cause" of the miner's total disability. *Gross*, 23 BLR at 1-18-19.

Turning first to Dr. Garson's opinion regarding the cause of claimant's totally disabling respiratory impairment, the administrative law judge properly found that the physician attributed twenty percent of claimant's pulmonary impairment to coal workers' pneumoconiosis, sixty percent of the impairment to COPD, and the remaining twenty percent of the impairment to emphysema. Decision and Order at 16; Director's Exhibit 13. The administrative law judge further properly concluded that as Dr. Garson stated that claimant's COPD was due to coal dust inhalation, and his emphysema was due to a combination of coal dust exposure and smoking, Dr. Garson's opinion supported a finding that claimant's disability is due to a combination of clinical and legal pneumoconiosis. *See Bonessa*, 884 F.2d at 734, 13 BLR at 2-37; *Gross*, 23 BLR at 1-18; Decision and Order at 16. Contrary to employer's arguments, whether Dr. Garson's apportionment of the causes of claimant's disability is sufficiently reasoned is for the administrative law judge to decide. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; Employer's Brief at 15-16. Therefore, we affirm the administrative law judge's crediting of Dr. Garson's opinion, as supported by substantial evidence. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97.

Employer also asserts that the administrative law judge erred in crediting Dr. Levine's opinion on disability causation, because Dr. Levine failed to address the role of claimant's smoking history on his impairment. Employer's Brief at 16. Contrary to

employer's argument, the administrative law judge acknowledged that Dr. Levine failed to address the possible role of smoking in the development of claimant's impairment, and acted within his discretion in finding Dr. Levine's opinion, that claimant is totally disabled due to coal and sand dust exposure, to be nonetheless "adequately reasoned and documented to establish that coal mine dust inhalation is a substantially contributing cause," in light of the abnormal pulmonary function study results he obtained after bronchodilators and claimant's forty-year coal mine employment history. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; Claimant's Exhibit 1; Decision and Order at 16-17.

Finally, we reject employer's assertion that the administrative law judge misinterpreted Dr. Fino's opinion when he found that it was "somewhat equivocal" and therefore did not directly contradict the opinions of Drs. Garson and Levine. Employer's Brief at 16; Employer's Exhibit 5. Specifically, employer contends that, contrary to the administrative law judge's finding, Dr. Fino definitively attributed claimant's disabling impairment to emphysema, unrelated to coal dust exposure. Employer's Brief at 16-17. Contrary to employer's contention, substantial evidence supports the administrative law judge's analysis of Dr. Fino's opinion.

As noted above, Dr. Fino stated in his report dated November 1, 2005, that testing performed in 1993 revealed a mild irreversible reduction in lung function that "could be" due to coal mine dust inhalation. Employer's Exhibit 5. Dr. Fino further stated that examination and testing performed in 2005 revealed the recent development of bullous emphysema, unrelated to coal mine employment, but that "there is still a portion of his lung function that is reduced and may be related to coal mine dust inhalation." Employer's Exhibit 5. Dr. Fino explained that comparison of the 1993 and 2005 pulmonary function studies supported his conclusion that the recently developed bullous emphysema "alone would not have disabled [claimant] from performing his last job," and that if claimant had a pulmonary impairment "due [only] to bullous emphysema and had no preexisting lung condition prior to 1993, he would not be disabled." *Id.* Thus, the administrative law judge permissibly concluded that Dr. Fino's "somewhat equivocal opinion," that claimant has a preexisting impairment that "may" be due to coal dust exposure, and which is a necessary cause of his total disability, did not directly contradict the opinions of Drs. Garson and Levine, that claimant's totally disabling respiratory impairment is due coal dust exposure. *See Bonessa*, 884 F.2d at 734, 13 BLR at 2-37; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; Decision and Order at 17. We therefore reject employer's contention that the administrative law judge misinterpreted Dr. Fino's opinion.

Therefore, as the administrative law judge considered all of the relevant medical opinion evidence, and permissibly concluded that the preponderance of the medical opinions establishes that claimant's occupational dust exposure is a substantially

contributing cause of his totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order – 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