BRB No. 09-0161 BLA

P.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHANNOPIN MINING COMPANY	)	
	)	
and	)	
	)	
THE FIRE & CASUALTY COMPANY OF CONNECTICUT	)	DATE ISSUED: 08/13/2009
	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Raymond F. Keisling (Carpenter, McCadden & Lane, LLP), Wexford, Pennsylvania, for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (07-BLA-6075) of Administrative Law Judge Daniel L. Leland (the administrative law judge) rendered on a subsequent claim[1] 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). After crediting claimant with thirty-two years of coal mine employment,[2] the administrative law judge found that the new x-ray and medical opinion evidence established the existence of both clinical and legal pneumoconiosis,[3] arising out of coal mine employment, under 20 C.F.R. §§718.202(a), 718.203(b). 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(d). On the merits of entitlement, the administrative law judge determined that claimant established that he is totally disabled by a respiratory impairment that is due to pneumoconiosis 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 that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer further asserts that the administrative law judge erred in finding that claimant's clinical pneumoconiosis that was established by the x-rays arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Employer argues that the administrative law judge erred in finding that claimant's totally disabling respiratory impairment is due to pneumoconiosis under 20 C.F.R. §718.204(c). Employer further

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[1] Claimant filed an initial claim for benefits on May 29, 2001. Director's Exhibit 1. His claim was denied by an administrative law judge on January 29, 2003, for failure to establish the existence of pneumoconiosis. *Id*. The record does not reflect that claimant took any further action on that claim.

Claimant filed the instant claim for benefits on October 26, 2006. Director's Exhibit 3. The District Director issued a Proposed Decision and Order Awarding Benefits on June 6, 2007. Director's Exhibit 17. Employer requested a hearing, and the case was forwarded to the Office of Administrative Law Judges on September 14, 2007. Director's Exhibits 18, 21.

[2] The record reflects that claimant's coal mine employment was in Pennsylvania. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] "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).

asserts that the administrative law judge erred in failing to give proper weight to the disease causation and disability causation findings made in the prior claim, in which the prior administrative law judge credited a medical opinion that claimant was totally disabled due to asthma, unrelated to coal mine employment. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that the prior administrative law judge's findings have no effect in the current claim, where claimant has established a change in an applicable condition of entitlement. Employer has filed a reply brief, stating that it "did not mean to imply" that the administrative law judge was bound by the prior administrative law judge's findings.[4]

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).

In order to establish entitlement to benefits in a living 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Rasmussen, Cohen, Celko, Fino, and Renn. Drs. Rasmussen, Cohen, and Celko diagnosed chronic obstructive pulmonary disease (COPD) caused by both coal dust exposure and smoking. Director's Exhibit 10; Claimant's Exhibits 2, 4, 8. Dr. Fino diagnosed claimant with an obstructive ventilatory defect, caused by smoking and "possibly" caused by coal dust. Employer's Exhibit 1. By contrast, Dr. Renn stated that claimant does not have legal pneumoconiosis and opined that his reversible obstructive ventilatory impairment is due entirely to extrinsic asthma. Employer's Exhibit 2.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a), and, therefore, also established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *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). We additionally affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). *Id.*

Considering this evidence, the administrative law judge credited the opinion of Dr. Rasmussen, as supported by that of Dr. Cohen, over the contrary opinion of Dr. Renn,[5] because Drs. Rasmussen and Cohen explained that, even if claimant has asthma, the asthma does not explain claimant's diffusion impairment. With respect to the opinions of Drs. Rasmussen and Cohen, the administrative law judge stated:

> I find that Dr. Rasmussen has thoroughly considered and analyzed all the medical evidence, including the evidence suggesting that [c]laimant suffers from asthma. Dr. Rasmussen has persuasively explained why each piece of evidence that Dr. Renn relied upon is insufficient to diagnose asthma. I find that the better reasoned opinion acknowledges the possibility of asthma with an underlying pulmonary condition caused by coal dust and smoking. Dr. Rasmussen's opinion is better reasoned because his finding of an underlying component of COPD accounts for [c]laimant's symptoms that are not explained by asthma, such as [c]laimant's diffusion impairment and the reduction in the single breath diffusion capacity.
>
> Dr. Rasmussen also has excellent credentials to render an opinion. Dr. Rasmussen is Board-certified in internal medicine and is a NIOSH certified B-reader. While Dr. Rasmussen is not certified in pulmonary medicine, he has a significant background in the study and treatment of coal dust-induced disease . . . .
>
> I also give great weight to the opinion of Dr. Cohen finding that [c]laimant has legal pneumoconiosis . . . . Dr. Cohen also considered a diagnosis of asthma, acknowledging the variability in the pulmonary function study results, but noted that [c]laimant's constant diffusion impairment is not diagnostic of asthma. Thus, even in light of a previous diagnosis of, and symptoms consistent with, asthma, Dr. Cohen concluded that [c]laimant has legal pneumoconiosis. Dr. Cohen's finding lends further support to Dr. Rasmussen's conclusion that even if [c]laimant has asthma, he has an underlying condition caused, in part, by coal dust.

Decision and Order at 10. By contrast, the administrative law judge stated with respect to Dr. Renn's opinion that:

> While Dr. Renn uses his diagnosis of asthma to explain [c]laimant's disability, he has not addressed Dr. Rasmussen's assertion that even if

[5] The administrative law judge discounted the opinions of Drs. Celko and Fino as conclusory and equivocal, respectively. Decision and Order at 11. No party has challenged this aspect of the administrative law judge's decision.

> [c]laimant has asthma, he also has COPD caused by coal dust or smoking as contributing factors to [c]laimant's impairment. As such, I find that Dr. Renn has failed to provide persuasive reasons for his complete exclusion of [c]laimants [*sic*] thirty-two years of coal mine employment as a cause of [c]laimant's pulmonary disability. While Dr. Renn is also well qualified to render an opinion, I find that his credentials do not outweigh the expertise of Dr. Rasmussen.

Decision and Order at 11. Thus, the administrative law judge determined that the "well reasoned and well documented" medical opinion evidence established the existence of legal pneumoconiosis, in the form of a "pulmonary impairment [that] was caused by coal dust and smoking, with a possible asthmatic component." Decision and Order at 11; *see* 20 C.F.R. §718.201(a)(2).

Employer raises several challenges to the administrative law judge's determination to credit Dr. Rasmussen's opinion over that of Dr. Renn. Initially, employer asserts that "[i]t is difficult to understand how Administrative Law Judge Leland could find that the credentials of Dr. Rasmussen outweighed those of Dr. Renn." Employer's Brief at 7. Contrary to employer's assertion, however, although the administrative law judge found that Dr. Rasmussen is well qualified to render an opinion as to the existence of pneumoconiosis, the administrative law judge did not find that Dr. Rasmussen's credentials were superior to those of Dr. Renn. Rather, the administrative law judge credited Dr. Rasmussen's opinion over that of Dr. Renn, because the administrative law judge found Dr. Rasmussen's opinion to be "better reasoned." Decision and Order at 10. As employer has mischaracterized the administrative law judge's finding, we reject employer's assertion of error.

We additionally reject employer's assertion that Dr. Rasmussen's diagnosis of legal pneumoconiosis is not supported by the record. Employer's Brief at 8. Contrary to employer's assertion, substantial evidence supports the administrative law judge's finding that "Dr. Rasmussen's opinion is supported by [c]laimant's exposure histories, and the objective medical evidence of record, including a reduced diffusion capacity and impairment in oxygen transfer." Decision and Order at 10; *see Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997); Claimant's Exhibit 4. Further, employer's assertion, that Dr. Rasmussen's opinion cannot be considered reasoned because it is, allegedly, based on an inaccurate asthma history, lacks merit, as the administrative law judge permissibly credited the opinions of both Drs. Rasmussen and Cohen that, even if claimant has asthma, he additionally has COPD caused by both smoking and coal dust exposure, since asthma does not account for claimant's reduced diffusion capacity. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Claimant's Exhibit 4 at 5; Claimant's Exhibit 8 at 46.

We additionally reject employer's assertion that the administrative law judge erred in finding that Dr. Rasmussen persuasively refuted the evidence upon which Dr. Renn relied in excluding coal dust exposure as a cause of claimant's respiratory impairment. Contrary to employer's assertion, Dr. Rasmussen's May 27, 2008 report specifically states:

> Dr. Renn points to the fact that [claimant] has had nasal polyps removed on at least a couple of occasions. He believed this was evidence for the presence of bronchial asthma. Certainly these things commonly occur together, sometimes beginning in the upper airways. There has [*sic*] been a couple of spirograph studies indicating some response to bronchodilator, however, *a response to bronchodilator is not in itself diagnostic of asthma*. *Asthma furthermore does not cause reduction in single breath diffusing capacity, which has been demonstrated in several studies*.

Claimant's Exhibit 4 at 4 (emphasis added). Thus, there is substantial evidence to support the administrative law judge's permissible credibility determination. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the record reflects that Dr. Renn did not review or question the validity of Dr. Rasmussen's diffusion capacity test, demonstrating a diffusion impairment. In light of the foregoing, we reject employer's assertions of error, and affirm the administrative law judge's permissible determination to credit Dr. Rasmussen's opinion as well-reasoned and documented, and as supported by Dr. Cohen's opinion, under 20 C.F.R. §718.202(a)(4). *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Although employer stated in its initial brief on appeal that the administrative law judge erred in failing to consider the findings of the prior administrative law judge which, employer argued, constituted a determination that claimant has only nonoccupational asthma, employer subsequently conceded, correctly, that the current administrative law judge was not bound by the findings of the prior administrative law judge. Employer's Reply Brief at 1; *see* 20 C.F.R. §725.309(d)(4). We therefore need not address the issue.

Because employer raises no further challenges to the administrative law judge's finding of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding. We additionally affirm the administrative law judge's finding that all the evidence weighed together established the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23, 21 BLR 2-104, 2-108 (3d Cir. 1997).

Pursuant to 20 C.F.R. §718.203(b), employer contends that "[t]he administrative law judge failed to give an adequate explanation and a reasonable decision that somehow

Category I [x]-rays that first appeared 14 years after the last exposure are related to coal mine work." Employer's Brief at 11. Employer's contention lacks merit.

The administrative law judge credited claimant with more than ten years of qualifying coal mine employment. Therefore, the administrative law judge correctly found that claimant is entitled to the rebuttable presumption that his clinical pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). Further, substantial evidence supports the administrative law judge's finding that there is no evidence of record rebutting this presumption. *See Mancia*, 130 F.3d at 584, 22 BLR at 2-234; Decision and Order at 11. Consequently, we affirm the administrative law judge's finding at 20 C.F.R. §718.203(b).

Pursuant to 20 C.F.R. §718.204(c), employer asserts that the administrative law judge erred in failing to take into consideration the "overwhelming evidence that the miner's disability is related to asthma," such as the asthma diagnoses contained in the medical opinions of Drs. Setty and Abrahams, in the miner's prior claim, and in the treatment records of Drs. Ayaas, Renn, Maxwell, and Snider. Employer's Brief at 8, 12. We disagree. The administrative law judge credited Dr. Rasmussen's opinion, as supported by Dr. Cohen's opinion, as establishing the existence of a "pulmonary impairment [that] was caused by coal dust and smoking, with a possible asthmatic component." Decision and Order at 11. Contrary to employer's assertion, therefore, the administrative law judge did not fail to consider whether claimant's disability is related to asthma. Further, contrary to employer's assertion, the administrative law judge did not ignore evidence of asthma. The administrative law judge specifically found that the treatment notes in Claimant's Exhibit 5 contain diagnoses of "extrinsic asthma."[6] Decision and Order at 7; Claimant's Exhibit 5. Moreover, the administrative law judge considered the opinions of Drs. Renn and Rasmussen, both of whom reviewed the medical reports of Drs. Setty and Abraham in forming their opinions. Claimant's Exhibit 4; Employer's Exhibit 2; *see Kramer*, 305 F.3d at 211, 22 BLR at 2-481 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. We therefore reject employer's assertion that the administrative law judge ignored relevant medical evidence.

Additionally, we reject employer's assertion that the administrative law judge erred in failing to credit Dr. Renn's disability causation opinion at 20 C.F.R. §718.204(c). Employer's Brief at 12. Contrary to employer's assertion, the administrative law judge permissibly discounted Dr. Renn's opinion, because Dr. Renn did not diagnose clinical or legal pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82,

[6] Claimant's Exhibit 5 contains the treatment notes of Drs. Aayas, Renn, and Maxwell. Although Dr. Snider's treatment of claimant is mentioned in the treatment notes, the record does not contain the opinion or treatment notes of Dr. Snider. Claimant's Exhibit 5.

2-99 (3d Cir. 2004); *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997). Because employer raises no further challenge to the administrative law judge's findings at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that claimant established that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. As claimant has established each element of entitlement, we affirm the award of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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