BRB Nos. 10-0680 BLA
and 10-0680 BLA-A

DENNIS R. SWISHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
K T K MINING & CONSTRUCTION COMPANY	)	
	)	
	)	
and	)	
	)	
QUAKER COAL COMPANY C/O GENERAL RECOVERY, INCORPORATED	)	DATE ISSUED: 08/23/2011
	)	
	)	
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 and the Decision and Order on Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration (08-BLA-5669) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 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).[1] The administrative law judge credited claimant with ten years of coal mine employment,[2] and found that the new medical evidence established the existence of both clinical and legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1),(4), that claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and that his total disability is due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).[3] The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[4] Considering all of the evidence on the merits of entitlement, the administrative law judge found that the only other medical evidence of record lacked probative value, because it was ten to fifteen years older than the medical evidence developed in this claim. Finding that claimant established all of the elements of entitlement, the administrative law judge awarded benefits. Pursuant to a Motion for Reconsideration filed by the Director, Office

[1] Claimant's first claim for benefits, filed on May 28, 1992, was denied on November 10, 1992 by the district director, because the evidence did not establish any element of entitlement. Director's Exhibit 1. Claimant's second application, filed on February 9, 2006, was denied by the district director as abandoned on July 25, 2006. Director's Exhibit 2. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Claimant filed this claim on August 30, 2007. Director's Exhibit 4.

[2] As claimant was last employed in the coal mining industry in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 5, 6.

[3] The administrative law judge accurately noted that there was no evidence that claimant's total disability is due to clinical pneumoconiosis. Decision and Order at 25 n.9.

[4] The administrative law judge did not specify which of his findings established a change in an applicable condition of entitlement. Decision and Order at 25. Since claimant did not establish any element of entitlement previously, a finding that he established any element with the new evidence was sufficient to establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d)(2),(3).

of Workers' Compensation Programs (the Director), the administrative law judge ordered that benefits are payable as of August 2007, the month in which claimant filed this claim.

On appeal, employer challenges the administrative law judge's evaluation of the medical opinions in finding legal pneumoconiosis and that claimant's total disability is due to legal pneumoconiosis.[5] Claimant responds, urging affirmance of the administrative law judge's award of benefits. On cross-appeal, claimant contends that the administrative law judge should have credited him with approximately seven more months of coal mine employment. The Director has not filed a response brief in this appeal.

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 establish entitlement 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.[6] 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 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).

Pneumoconiosis

Employer argues that the administrative law judge committed numerous errors in finding that the medical opinion evidence established the existence of legal

[5] Employer does not challenge the administrative law judge's findings that the new evidence established total disability and a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d), or his finding regarding the date that benefits commence, pursuant to 20 C.F.R. §725.503. We therefore affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Because claimant alleges fewer than fifteen years of coal mine employment, and because we affirm the administrative law judge's award of benefits, this case is not affected by a recent amendment to the Act that reinstated the rebuttable presumption of total disability due to pneumoconiosis, at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.SC. §921(c)(4)).

pneumoconiosis.[7] The administrative law judge correctly noted that Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to both cigarette smoking and coal mine dust exposure. Director's Exhibits 12, 13. Drs. Rosenberg and Broudy diagnosed lung disease and impairment due to cigarette smoking, and they opined that claimant's coal mine dust exposure did not cause or contribute to his disease and impairment. Director's Exhibit 13; Employer's Exhibit 1.

The administrative law judge found that the diagnosis of legal pneumoconiosis provided by Dr. Rasmussen was well-reasoned and well-documented. Decision and Order at 16-20. In contrast, the administrative law judge discounted Dr. Broudy's opinion because he found that it was inadequately explained, and discounted Dr. Rosenberg's opinion because he found that it was based on reasoning contrary to a premise underlying the regulations. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Employer asserts that the administrative law judge erred in finding Dr. Rasmussen's opinion diagnosing legal pneumoconiosis to be well-reasoned and well-documented. Specifically, employer argues that the administrative law judge did not adequately take into account the discrepancy between the smoking histories and coal mine employment histories that he found established, and those that were relied upon by Dr. Rasmussen. Upon review of the administrative law judge's Decision and Order, we disagree with employer.

The administrative law judge considered the discrepancy between the forty-five pack-year smoking history that he found established, and the twenty-three "plus" pack-years considered by Dr. Rasmussen. Decision and Order at 17. The administrative law judge found that this discrepancy was not a basis for discrediting Dr. Rasmussen's diagnosis of legal pneumoconiosis, as Dr. Rasmussen considered a significant smoking history and indicated that was aware that claimant's smoking history could be greater than twenty-three pack years, by noting that claimant smoked one pack "or more" of cigarettes per day. Director's Exhibit 12. Further, the administrative law judge found that Dr. Rasmussen "did not appear to place great reliance on the specific number of years that Claimant smoked in making his diagnosis," but rather, recognized that

[7] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

claimant's smoking history of "23+ pack years" was significant, yet opined that claimant's ten years of coal mine dust exposure was "a significant co-contributor" to his COPD. Decision and Order at 17. Based upon our review of the record and the administrative law judge's findings, we hold that the administrative law judge reasonably concluded that the discrepancy in the smoking history did not require him to discredit Dr. Rasmussen's opinion. *See Tenn. Consol. 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 2-99, 2-103 (6th Cir. 1983); *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993).

We also reject employer's assertion that the administrative law judge did not adequately address whether Dr. Rasmussen considered an accurate length of coal mine employment. Dr. Rasmussen's initial examination report was based on claimant's reported history of seventeen years of coal mine employment. Director's Exhibit 12. Later, however, the district director asked Dr. Rasmussen to reconsider his opinion, assuming that claimant had only ten years of coal mine employment. Dr. Rasmussen responded that he "continue[d] to believe [claimant's] severe chronic obstructive lung disease was due in part to coal mine dust exposure even though this was only 10 years." Director's Exhibit 12. Specifically, Dr. Rasmussen explained that "[t]en years is a sufficient period of time for a susceptible individual to develop legal pneumoconiosis," that both coal mine dust and smoking cause emphysema, and that their effects are indistinguishable. He therefore concluded that, while claimant's smoking may contribute relatively more to his impairment, "[coal] mine dust represents a significant co-contributor." *Id*.

Additionally, employer asked Dr. Rasmussen to reconsider his opinion assuming only nine years of coal mine employment. Director's Exhibit 13. In response, Dr. Rasmussen opined that, in view of nine years of coal mine employment, he believed that coal mine dust exposure contributed to claimant's impairment, but that it "would be a minimal contributing factor." Director's Exhibit 13.

The administrative law judge found that claimant had ten years of coal mine employment, using the same calculation method that the district director had used to also find ten years established, based on claimant's Social Security earnings records. Decision and Order at 12. The administrative law judge further found that, when Dr. Rasmussen was asked to consider claimant's actual history of ten years of coal mine employment, he unequivocally opined that coal mine dust exposure was a significant cause of claimant's COPD. Decision and Order at 8, 17-18; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Therefore, we reject employer's argument that the administrative law judge did not adequately address whether Dr. Rasmussen considered an accurate coal mine employment history. Moreover, in its brief, employer alleges no specific error in the administrative law judge's finding of ten years

of coal mine employment.[8] As Dr. Rasmussen relied on the same ten-year coal mine employment history found established by the administrative law judge, we reject employer's contention that the administrative law judge erred in declining to discuss Dr. Rasmussen's additional report provided to employer, addressing a hypothetical history of nine years of coal mine employment.

Employer further asserts that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Broudy. We disagree. The administrative law judge found that Dr. Rosenberg's reasoning, that claimant's lung disease is unrelated to coal mine employment because the FEV1/FVC ratio decreases with exposure to cigarette smoking, but is preserved with exposure to coal mine dust, Director's Exhibit 13, is contrary to the Department of Labor's finding that the medical literature underlying its revision of the definition of legal pneumoconiosis establishes that coal mine dust exposure can cause a significant decrease in the FEV1/FVC ratio. Decision and Order at 18, *quoting* 65 Fed. Reg. 79920, 79943 (Dec. 20, 2000). The administrative law judge permissibly found that Dr. Rosenberg's opinion as to the etiology of claimant's COPD merited less weight, because the doctor relied on a premise at odds with the medical science credited by the Department of Labor when it promulgated the revised regulations. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

We also reject employer's argument that the administrative law judge erred in his consideration of Dr. Broudy's opinion. The administrative law judge found that Dr. Broudy's statement, that claimant's impairment is unrelated to coal mine dust exposure because it is "unusual for impairment due to coal dust exposure to be reversible, as it was in this case," Director's Exhibit 13; *see also* Employer's Exhibit 1, did not adequately explain why claimant's responsiveness to bronchodilator treatment precluded a diagnosis of legal pneumoconiosis. Decision and Order at 18-19. The administrative law judge, as the finder-of-fact, permissibly determined that Dr. Broudy did not adequately explain his opinion that claimant's responsiveness to bronchodilator treatment precluded a diagnosis of legal pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

[8] At one point in its brief, employer states that the nine-year history of coal mine employment that it gave to Dr. Rasmussen was "the correct history," and at another point, it states that it believes claimant had six and one-half to seven years of coal mine employment. Employer's Brief at 2, 3. Employer, however, does not allege a specific error in the administrative law judge's calculation of ten years of coal mine employment.

In sum, because the administrative law judge's credibility determinations regarding the reasoning of the medical opinions are rational and supported by substantial evidence, we affirm them. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). In view of our holdings, there is no merit in employer's assertion that the administrative law judge erred by not considering that Dr. Rasmussen is not Board-certified in Pulmonary Disease, as are Drs. Broudy and Rosenberg. Therefore, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4).[9]

Total Disability Due to Pneumoconiosis

In finding that the evidence established that claimant's total disability is due to his legal pneumoconiosis pursuant to Section 718.204(c), the administrative law judge credited the opinion of Dr. Rasmussen, that legal pneumoconiosis significantly contributes to claimant's total disability, and accorded less weight to those of Drs. Rosenberg and Broudy, because those physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding.

Employer argues that Dr. Rasmussen's opinion is insufficient to support a finding of disability causation, because Dr. Rasmussen relied upon an inaccurate smoking history. Contrary to employer's contention, as discussed above, the administrative law judge rationally took into account the smoking history issue, and reasonably explained why he relied upon the reasoned and documented opinion of Dr. Rasmussen to find that claimant established the existence of legal pneumoconiosis. Therefore, the administrative law judge rationally relied upon Dr. Rasmussen's opinion to find that claimant is totally disabled due to legal pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). In addition, the administrative law judge rationally discounted the opinions of Drs. Rosenberg and Broudy, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826,

[9] The administrative law judge properly recognized that his finding of legal pneumoconiosis necessarily subsumed the inquiry of whether claimant's pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203; *Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

13 BLR 2-52, 2-63-64 (6th Cir. 1989). Therefore, we affirm the administrative law judge's finding that claimant's total disability is due to legal pneumoconiosis, and we affirm the award of benefits.

In view of our affirmance of the administrative law judge's award of benefits, we need not address the arguments raised in claimant's cross-appeal regarding the administrative law judge's length of coal mine employment finding. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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