BRB No. 05-0420 BLA

HAROLD L. TERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	DATE ISSUED: 12/29/2005
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Third Decision and Order on Remand Awarding Benefits of Daniel F. Sutton, Administrative Law Judge United States Department of Labor.

Mary Z. Natkin (Legal Practice Clinic, Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Third Decision and Order on Remand Awarding Benefits (96-BLA-1383) of Administrative Law Judge Daniel F. Sutton rendered 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). This case, as presently postured, is

before the Board for a fourth time.[1] When this case was most recently before the Board, the Board vacated the administrative law judge's findings that the existence of legal pneumoconiosis and disability causation were established and remanded the case for reconsideration of the medical opinion evidence relevant to those issues. 20 C.F.R. §§718.202(a)(4), 718.204(c).[2] *Terry v. Hobet Mining, Inc.*, BRB No. 03-0141 BLA (Oct. 31, 2003) (unpub.).

On remand, the administrative law judge again found that the medical opinion evidence was sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant's total disability was due to pneumoconiosis 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 medical opinion evidence sufficient to establish the existence of "legal" pneumoconiosis. Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis. Lastly, employer asserts that this case has reached "administrative gridlock" and that remand of the case to a different administrative law judge is, therefore, required. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge applied the correct legal standard to find the existence of legal pneumoconiosis established.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer asserts that, in determining that claimant established the existence of "legal" pneumoconiosis, the administrative law improperly afforded claimant a presumption that he suffered from a pulmonary impairment aggravated by coal mine dust exposure. Contrary to employer's assertion, however, review of the administrative law judge's third Decision and Order demonstrates that the administrative law judge correctly placed the burden of proving the existence of "legal" pneumoconiosis on claimant.

[1] The history of this claim is detailed in the Board's prior decisions in *Terry v. Hobet Mining, Inc.*, BRB No. 03-0141 BLA (Oct. 31, 2003)(unpub.) and *Terry v. Hobet Mining Inc.*, BRB No. 01-0212 BLA (Nov. 15, 2001)(unpub.).

[2] Claimant died on July 2, 2003.

Director, OWCP v. Greenwich Collieries [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). The administrative law judge weighed the medical opinion evidence of record, and based his finding of "legal" pneumoconiosis on his conclusion that the evidence supportive of such a determination was better reasoned than the contrary evidence. Such a determination is within the administrative law judge's purview. *Id*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). We therefore reject employer's assertion in this regard.

Regarding the medical evidence in question, employer contends that the administrative law judge committed numerous errors in finding that the medical opinion evidence was sufficient to establish the existence of "legal" pneumoconiosis.[3] *See* 20 C.F.R. §718.201(a)(2). The administrative law judge found that the medical opinions of Drs. Rasmussen, Doyle and Koenig supported a finding of "legal" pneumoconiosis and credited these opinions over the contrary opinions of Drs. Zaldivar, Fino, Hippensteel, Kress and Morgan. Third Decision and Order on Remand at 5-28; Director's Exhibits 30, 35, 54; Claimant's Exhibits 3, 4, 16, 27, 32; Employer's Exhibits 1, 3, 6, 7, 10, 16, 17; Hearing Transcript at 59-169. The administrative law judge therefore found the medical opinion evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in relying upon Dr. Rasmussen's opinions as support for a finding of "legal" pneumoconiosis pursuant to Section 718.202(a)(4). Employer contends that Dr. Rasmussen's opinion was both equivocal and speculative as the physician diagnosed "questionable occupational pneumoconiosis" and that it was "possible" that claimant's coal mine dust exposure had been a significant contributing factor to his totally disabling respiratory impairment. Director's Exhibit 30. Employer asserts that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held in *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999) that a physician's use of such qualified language precludes an opinion from being a reasonable medical opinion and thus cannot support a finding of legal pneumoconiosis. Employer avers that the administrative law judge's attempt to distinguish *Jarrell* from the instant case is irrational inasmuch as the court in *Jarrell* specifically held that an equivocal opinion cannot satisfy claimant's burden of proof. Further, employer argues that Dr. Rasmussen based his diagnosis of legal pneumoconiosis on x-ray evidence and inasmuch as the x-ray evidence was found not to be supportive of the existence of pneumoconiosis, the physician's opinion cannot constitute probative evidence of the

[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).

existence of the disease. Lastly, employer asserts that the administrative law judge erred in failing to make a sufficient inquiry into whether Dr. Rasmussen's opinion was well-reasoned.

We reject employer's assertions with regard to the opinion of Dr. Rasmussen and hold that the administrative law judge complied with the Board's remand instructions to address the equivocal and speculative nature of the physician's opinion. In addressing Dr. Rasmussen's opinion, the administrative law judge concluded, in a permissible exercise of his discretion, that the physician's opinion simply "acknowledge[s] the uncertainty inherent in medical opinions and that review of the physician's opinion on the whole clearly demonstrated that the physician diagnosed the presence of "legal pneumoconiosis." Third Decision and Order on Remand at 8; *see Piney Mountain Coal Co. v Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-606 (4th Cir. 1999) ("to overturn the [administrative law judge], we would have to rule as a matter of law that no 'reasonable mind' could have interpreted and credited the doctor's opinion as the [administrative law judge] did").

Further, contrary to employer's assertion, the administrative law judge permissibly distinguished the opinion of Dr. Rasmussen in the instant case from that of the physician in *Jarrell* inasmuch as Dr. Rasmussen's opinion in this case is supported by the evidence, *i.e.*, claimant's history of coal mine dust exposure and test results demonstrating the link between claimant's respiratory impairment and coal mine employment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Moreover, contrary to employer's assertion, implicit in an administrative law judge's reliance on a particular physician's opinion is a finding that the opinion is reasoned, *see Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *see also Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 448, 16 BLR 2-74, 2-79 (7th Cir. 1992), and the determination of whether an opinion is reasoned is within the sound discretion of the administrative law judge, *Clark*, 12 BLR 1-149, 155; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, in considering Dr. Rasmussen's medical opinions, the administrative law judge further found that "any equivocation was removed" by Dr. Rasmussen's second opinion, of July 21, 1997, in which the physician, "without reservation" specifically opined that claimant suffered from pneumoconiosis arising out of coal mine employment based on a single breath diffusing capacity test. Claimant's Exhibit 16; Third Decision and Order on Remand at 9. We thus reject employer's assertions and hold that the administrative law rationally determined Dr. Rasmussen's opinion to be supportive of a finding of "legal" pneumoconiosis.

Employer further argues that the administrative law judge erred in finding the opinion of Dr. Doyle supportive of a finding of "legal" pneumoconiosis. Employer argues that the administrative law judge failed to address criticism of Dr. Doyle's opinion rendered by Dr. Zaldivar and thus erred in failing to resolve the conflict between these physicians. Employer also contends that the administrative law judge erred in failing to consider the qualifications of Dr. Doyle, a family physician who is not board certified in pulmonary disease or internal medicine.

We reject employer's assertions and hold that the administrative law judge complied with the Board's remand instructions and that he rationally concluded that Dr. Doyle's opinions supported a finding of "legal" pneumoconiosis. In reaching this determination the administrative law judge considered the opinion of Dr. Doyle, Claimant's Exhibit 26, and, in a permissible exercise of his discretion, found that the physician's conclusions "recognized the appropriate distinction between clinical and legal pneumoconiosis" and found the opinion "sufficiently reasoned" as the physician addressed the objective studies of record and discussed claimant's medical, mining and cigarette smoking histories, Third Decision and Order on Remand at 10-11. *Clark*, 12 BLR 1-149 (1989); *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. We hold that the administrative law judge permissibly concluded the opinion was supportive of a finding of "legal" pneumoconiosis. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Stiltner*, 86 F.3d 337, 20 BLR 2-246 *Underwood*, 105 F.3d 946, 21 BLR 2-23.

Employer also asserts that the administrative law judge erred in relying upon the opinion of Dr. Koenig as support for a finding of "legal" pneumoconiosis. Employer argues that, as with Dr. Rasmussen, the administrative law judge failed to fully address the speculative nature of Dr. Koenig's opinion and further argues that Dr. Koenig did not have the benefit of reviewing all the evidence inasmuch as he only reviewed Dr. Zaldivar's May 14, 1997 opinion.

We reject employer's assertions and hold that the administrative law judge complied with the Board's remand instructions and rationally concluded that Dr. Koenig's opinion was supportive of the opinions of Drs. Rasmussen and Doyle and thus supportive of a finding of "legal" pneumoconiosis. The administrative law judge found that Dr. Koenig reviewed Dr. Zaldivar's May 14, 1997 report and questioned Dr. Zaldivar's conclusion that coal mine dust exposure played no role in claimant's emphysema and asthma. The administrative law judge noted that Dr. Koenig relied upon several studies for his conclusion that coal dust exposure, independent of smoking, could cause the same type of emphysema that claimant suffered from. The administrative law judge further considered Dr. Koenig's conclusion, that while reversible airflow obstruction and airway hyperactivity were components of asthma, medical literature also supported a finding that such components could arise from coal dust exposure as well.

The administrative law judge found that Dr. Koenig's ultimate conclusion that "coal dust exposure, independent of smoking, and without the presence of [clinical] pneumoconiosis, could also account" for claimant's condition, Claimant's Exhibit 4, served as a refutation of Dr. Zaldivar's conclusions and was entitled to superior weight than Dr. Zaldivar's opinion as Dr. Koenig possessed superior credentials and relied more extensively on medical literature as support. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. We thus hold that the administrative law judge rationally determined Dr. Koenig's conclusions to be supportive of the finding of legal pneumoconiosis diagnosed by Dr. Rasmussen and Dr. Doyle.

Employer further argues that the administrative law judge erred in concluding that the opinions of Drs. Rasmussen, Koenig and Doyle were entitled to greater weight than those of Drs. Zaldivar, Fino, Hippensteel, Kress and Morgan. Such an assertion is tantamount to a request that the Board reweigh the evidence of record, a role outside the Board's scope of review. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Moreover, we hold that the administrative law judge rationally accorded less weight to the latter opinions. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Stiltner*, 86 F.3d 337, 20 BLR 2-246; *Underwood*, 105 F.3d 946, 21 BLR 2-23.

Employer argues that the administrative law judge erred in discrediting Dr. Zaldivar's opinion that claimant did not suffer from "legal" pneumoconiosis. Specifically, employer asserts that the administrative law judge erred in assigning less weight to Dr. Zaldivar's opinion as "inimical" to the Act. Employer contends that, contrary to the administrative law judge's determination, Dr. Zaldivar was not evasive and argumentative at deposition, but instead answered questions fully and completely. Employer further argues that the administrative law judge mischaracterized Dr. Zaldivar's opinion as not citing any studies and erred in finding that Dr. Zaldivar did not explain his disagreement with the conclusions of Dr. Koenig. Lastly employer argues that the administrative law judge erred in concluding that Dr. Koenig possessed superior qualifications to Dr. Zaldivar and erred in failing to explain why the certification of Dr. Koenig made the physician better qualified to diagnose coal-mine induced lung disease.

We reject employer's assertions. The administrative law judge permissibly accorded less weight to the opinions of Dr. Zaldivar. In reviewing the physician's opinion on remand, in light of the Board's instructions, the administrative law judge recognized that Dr. Zaldivar's opinion could not be rejected as hostile to the Act. Decision and Order on Third Remand at 15. Instead, the administrative law judge clarified his other reasons for according less weight to Dr. Zaldivar's opinion. Specifically, the administrative law judge concluded that Dr. Zaldivar's reasons for finding that claimant did not suffer from legal pneumoconiosis were not credible based on his assessment of the record and Dr. Zaldivar's testimony at the hearing. Decision and

Order on Third Remand at 15. Credibility determinations are within the purview of the administrative law judge and will not be disturbed by Board absent a showing of an abuse of discretion. *See Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 805, 21 BLR 2-302, 2-311 (4th Cir. 1998); *see Ondecko*, 512 U.S. 267, 18 BLR 2A-1. Such an abuse of discretion has not been shown in this case. Instead, the administrative law judge rationally accord less weight to the opinion of Dr. Zaldivar. *Clark*, 12 BLR 1-155; *see Kozele*, 6 BLR 1-378 (1983).

Employer further asserts that the administrative law judge erred in according lesser weight to the opinion of Dr. Fino that claimant did not suffer from legal pneumoconiosis. Employer argues that Dr. Fino's statement that "there is no good clinical evidence in the medical literature that coal mine dust inhalation in and of itself causes significant obstructive lung disease," Director's Exhibit 41, was merely a commentary on the recently amended regulations and, as such, is not binding. Employer argues, however, that Dr. Fino specifically opined that this particular claimant suffered from no impairment arising out of coal mine dust exposure and that the physician's opinion was therefore sufficient to establish the absence of "legal" pneumoconiosis. Employer also asserts that Dr. Finn's opinion satisfies the standard enunciated in *Stiltner* 86 F.3d 337, 20 BLR 2-246, and *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), and thus the administrative law judge's characterization of the opinion as hostile to the Act is erroneous.

We reject employer's assertions and hold that the administrative law judge permissibly accorded lesser weight to the conclusions of Dr. Fino. In a permissible exercise of his discretion, the administrative law judge determined that Dr. Fino's opinion more fully focused on the absence "clinical pneumoconiosis," and the physician failed to fully explain the basis of his conclusions. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985).

Employer next argues that the administrative law judge erred in discrediting the opinion of Dr. Hippensteel that claimant did not suffer from "legal" pneumoconiosis inasmuch as the physician clearly addressed the issue and fully explained the basis for his conclusions. Director's Exhibit 43; Employer's Exhibits 7, 10. This assertion is rejected. The administrative law judge permissibly accorded little weight to Dr. Hippensteel's opinions as the administrative law judge concluded that Dr. Hippensteel failed to fully address the issue of legal pneumoconiosis in this particular claimant and instead, "overwhelmingly focused" on the issue of "clinical" pneumoconiosis. The administrative law judge therefore reasonably concluded that Dr. Hippensteel's opinion was not as credible as those opinions which more fully addressed the existence of "legal" pneumoconiosis. Third Decision and Order on Remand at 25; *see Hicks*, 138 F.3d 524,

21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *York*, 7 BLR 1-766; *Oggero*, 7 BLR, 7 BLR 1-860; *Cooper* 7 BLR 1-842.

Lastly, with regard to the existence of "legal" pneumoconiosis, employer argues that the administrative law judge erred in discrediting the opinions of Drs Morgan and Kress that claimant did not suffer from "legal" pneumoconiosis. Employer argues that the opinions of both physicians were fully explained, they relied upon a multiplicity of factors and were not hostile to the Act. Contrary to employer's argument, however, the administrative law judge complied with the Board's remand instructions regarding these opinions and permissibly found that the opinions were not well-reasoned as Drs. Morgan and Kress did not address the most recent physical findings regarding the miner and thus their opinions did not accurately reflect the miner's actual condition. *See generally Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Consequently, inasmuch as the administrative law judge has provided affirmable legal bases for his conclusions and has complied with the Board's remand instructions, we affirm his finding of "legal" pneumoconiosis and his finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a). *Island Creek Coal Co., v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Next, we consider employer's assertion that the administrative law judge erred in concluding that claimant established disability causation at Section 718.204(c). The regulation at Section 718.204 states that a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause if it has a material adverse effect on the miner's respiratory or pulmonary condition or it 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); *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Claimant must demonstrate that pneumoconiosis is a necessary condition of disability; it must play more than a *de minimis* role in claimant's disabling respiratory impairment. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003).

With regard to the existence of disability causation at Section 718.204(c), employer argues that the administrative law judge erred in crediting the medical opinions of Drs. Rasmussen, Doyle and Koenig, that both cigarette smoking and pneumoconiosis were substantially contributing factors in claimant's disabling respiratory impairment over the opinions of Drs. Hippensteel, Morgan, Fino, Zaldivar, Kress and Daniel, all of whom concluded that claimant's totally disabling respiratory impairment could not have arisen out of pneumoconiosis inasmuch as claimant did not suffer from pneumoconiosis.

Contrary to employer's argument, the administrative law judge may accord less weight to medical reports regarding the cause of claimant's total disability if the physicians did not diagnose the presence of pneumoconiosis or a disabling respiratory impairment. *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-374 (4th Cir. 2002); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Thus, the administrative law judge permissibly accorded less weight to the causation opinions of Drs. Hippensteel, Morgan, Fino, Zaldivar, Kress and Daniel, as their failure to diagnose pneumoconiosis or total respiratory disability undermined the credibility of their disability causation findings. We further reject employer's assertion that the administrative law judge erred in finding the reports of Drs. Rasmussen, Doyle, and Koenig, attributing claimant's total respiratory disability to his pneumoconiosis, supportive of a finding of disability causation, because the record supports the administrative law judge's finding that these physicians thoroughly explained how their documentation supported their conclusions. *Gross v.* 23 BLR 1-8; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Accordingly, we affirm the administrative law judge's finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).[4]

[4] Because we affirm the award of benefits, we need not address employer's request for reassignment to a different administrative law judge.

Accordingly, the administrative law judge's Third Decision and Order on Remand 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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REGINA C. McGRANERY
Administrative Appeals Judge