BRB No. 09-0229 BLA

TONEY LEE MAHON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEN COAL CORPORATION	)	DATE ISSUED: 12/16/2009
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Julie Rundle & Associates), Pineville, West Virginia, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Ann Marie Scarpino (Deborah Greenfield, Acting 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05530) of Administrative Law Judge Adele Higgins Odegard with respect to a subsequent 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).[1] The administrative law judge credited claimant with 16.37 years of coal mine employment and considered the newly submitted evidence in accordance with the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, however, the administrative law judge found that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge erred in finding that Dr. Hussain's opinion was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer responds, urging affirmance of the denial of benefits, but challenging the administrative law judge's discrediting of the opinions of Drs. Zaldivar and Repsher. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in which he alleges that the administrative law judge erred in discrediting Dr. Hussain's opinion.[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 supported by substantial evidence, is rational,

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[1] Claimant filed his first application for benefits on August 11, 2000. Director's Exhibit 1. The district director denied benefits on February 7, 2001, as claimant did not establish any of the elements of entitlement. *Id*. Claimant filed a second application for benefits on July 12, 2004. *Id*. The district director determined that although claimant had established the existence of pneumoconiosis, he did not prove that he was totally disabled due to pneumoconiosis. *Id*. Accordingly, the district director denied benefits on April 1, 2005. *Id*. Claimant took no further action until filing the present subsequent claim on July 3, 2006. Director's Exhibit 4.

[2] We affirm the administrative law judge's determination that claimant had 16.37 years of coal mine employment and her findings that claimant established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), but did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), as these findings have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable law.[3] 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Hussain, Zaldivar and Repsher. Dr. Hussain, who is Board-certified in pulmonary medicine, examined claimant at the request of the Department of Labor on July 26, 2006. Director's Exhibit 12. Dr. Hussain obtained a chest x-ray, qualifying pulmonary function studies (PFSs), nonqualifying blood gas studies (BGSs) and an EKG. *Id*. Dr. Hussain diagnosed legal pneumoconiosis, caused by coal dust exposure, and chronic obstructive pulmonary disease (COPD), caused by cigarette smoking.[4] *Id*. Dr. Hussain identified claimant's history of coal dust exposure, the abnormal PFSs, and BGSs showing hypoxemia as the bases for his diagnosis of legal pneumoconiosis. *Id*. Dr. Hussain concluded that claimant has a severe pulmonary impairment, seventy-percent of which is attributable to legal pneumoconiosis. *Id*.

Dr. Zaldivar who is Board-certified in pulmonary medicine, examined claimant on December 20, 2006, and obtained an x-ray, qualifying PFSs, nonqualifying BGSs and an

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[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last years of coal mine employment were in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 5; Hearing Transcript at 16.

[4] Under 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." Pursuant to 20 C.F.R. §718.201(a)(2), "'legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment."

EKG. Employer's Exhibits 3, 4. Dr. Zaldivar also reviewed Dr. Hussain's report. Employer's Exhibit 3. In a report dated January 8, 2007, Dr. Zaldivar concluded that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis or any dust disease of the lung. *Id.* Dr. Zaldivar further determined that claimant's PFS results are consistent with asthma and that claimant would not be able to perform his usual coal mine job without extensive treatment with bronchodilators. *Id.* Dr. Zaldivar also indicated that claimant has cardiac disease, which could prevent him from performing manual labor. *Id.* In a deposition obtained on October 15, 2007, Dr. Zaldivar reiterated his conclusions. Employer's Exhibit 6.

Dr. Repsher, who is Board-certified in pulmonary medicine, examined claimant on June 27, 2007, and obtained an x-ray, qualifying PFSs, a nonqualifying BGS, an EKG and a CT scan.[5] Employer's Exhibits 1, 2. Dr. Repsher stated that there was no evidence of medical or legal coal workers' pneumoconiosis or any other disease related to coal dust exposure. Employer's Exhibit 1. Dr. Repsher diagnosed severe COPD, "most likely due to [claimant's] long and heavy cigarette smoking habit," inadequately controlled hypertension, mild coronary artery disease, neuralgia and healed tuberculosis. *Id.* Dr. Repsher reiterated his diagnoses in a deposition obtained on October 15, 2007. Employer's Exhibit 5.

The administrative law judge reviewed this evidence under Section 718.202(a)(4) and determined that none of the physicians provided a well-reasoned opinion regarding the etiology of claimant's pulmonary impairment. Decision and Order at 20. With respect to Dr. Hussain's diagnoses of legal pneumoconiosis and COPD, the administrative law judge found:

> Dr. Hussain's opinion that the [c]laimant had both legal pneumoconiosis and a tobacco related disease was conclusory. He stated that the [c]laimant's dyspnea, abnormal pulmonary function tests and hypoxemia led him to his conclusion, but did not explain in any detail what about those test results or symptoms indicated legal pneumoconiosis. In addition, Dr. Hussain did not explain how (if at all) these same symptoms and test results were not also consistent with the [c]laimant's COPD, which he also diagnosed. Because Dr. Hussain's opinion was conclusory, and does not distinguish the symptoms in the two conditions he diagnosed, I find it not well[-]reasoned, and I give it little weight.

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[5] The administrative law judge determined that the pulmonary function studies performed by Dr. Repsher were not valid because they did not include three sets of tracings, as required in Appendix B to 20 C.F.R. Part 718. Decision and Order at 8.

Id. at 19. The administrative law judge also determined that Dr. Repsher's opinion was entitled to little weight because he did not adequately address the possibility that coal dust exposure was responsible for a portion of claimant's fixed pulmonary impairment. *Id*. at 20. Similarly, the administrative law judge found that Dr. Zaldivar did not discuss whether coal dust exposure played a role in the pulmonary impairment that remained following the administration of bronchodilators. *Id*. Based upon this consideration of the medical opinion evidence, the administrative law judge concluded that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Id*. at 21. The administrative law judge further found that, when weighed together in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a). *Id*.

Claimant argues that the administrative law judge did not properly apply *Compton*, as she weighed the evidence separately under each subsection of Section 718.202(a). Claimant further asserts, "the record in this claim does support Dr. Hussain's conclusion that the claimant's chest x-rays do show pneumoconiosis and that the disease contributes to his totally disabling impairment." Claimant's Brief at 6-7. Claimant's arguments are without merit. In accordance with *Compton*, the administrative law judge recognized that clinical and legal pneumoconiosis are separately defined conditions and weighed together the evidence relevant to each. Decision and Order at 21-22. In addition, claimant's assertion that Dr. Hussain indicated that the x-ray evidence is positive for pneumoconiosis is unsupported by the record, as Dr. Hussain stated that claimant's chest x-ray was "normal." Director's Exhibit 12. Claimant's remaining contentions do not identify an error in the administrative law judge's decision to discredit Dr. Hussain's opinion and are, therefore, tantamount to a request that the Board reweigh the evidence, a function that the Board is not empowered to perform. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

The Director also challenges the administrative law judge's treatment of Dr. Hussain's opinion. The Director maintains that because Dr. Hussain based his opinion upon an abnormal PFS, a BGS that he described as showing hypoxemia, and claimant's history of coal dust exposure, the administrative law judge erred in finding that it was conclusory. The Director further argues that the administrative law judge's finding, that Dr. Hussain's opinion was unreasoned because he did not distinguish between the symptoms caused by the two conditions he diagnosed, is unsupported by the record. The Director states, "Dr. Hussain did not diagnose two conditions, but rather a single disabling pulmonary impairment stemming from two causes – coal dust and smoking." Director's Brief at 5. The Director contends that Dr. Hussain's ultimate conclusion, that coal dust exposure was responsible for seventy-percent of claimant's impairment, was

sufficient to satisfy both the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(b) and claimant's burden under Section 718.202(a)(4).

The Director's allegations of error are without merit. A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Assessing whether a medical opinion is reasoned is a duty that is committed to the discretion of the administrative law judge in his or her role as fact-finder. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). The Board cannot substitute its conclusions for the rational inferences made by the administrative law judge. *See Anderson*, 12 BLR at 1-113.

In the present case, the administrative law judge acted within her discretion in determining that Dr. Hussain's opinion was conclusory and, therefore, not well-reasoned, as "[h]e stated that the [c]laimant's dyspnea, abnormal pulmonary function tests and hypoxemia led him to his conclusion, but did not explain in any detail what about those test results or symptoms indicated legal pneumoconiosis." Decision and Order at 19; Director's Exhibit 12; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). As the administrative law judge found, because Dr. Hussain did not explain how the factors he identified actually bolstered his diagnosis of legal pneumoconiosis, the administrative law judge could not ascertain whether these factors were adequate to support Dr. Hussain's conclusion. Thus, regardless of the Director's allegation of error as to the administrative law judge's additional statement that Dr. Hussain did not "distinguish the symptoms in the two conditions he diagnosed," we conclude that the administrative law judge provided a valid rationale for discrediting Dr. Hussain's opinion. Decision and Order at 19; *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-383 n.4 (1983). We affirm, therefore, the administrative law judge's determination that Dr. Hussain's opinion was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and his finding that the evidence, when weighed together, did not prove that claimant has pneumoconiosis pursuant to Section 718.202(a).

Because we have affirmed the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits. *See Trent*, 11 BLR at 1-27. We also decline to address employer's allegations of error concerning the administrative law judge's weighing of the opinions of Drs. Repsher and Zaldivar at Section 718.202(a)(4), as error, if any, is harmless in light of our affirmance of the administrative law judge's finding that claimant did not meet his burden of proof at Section 718.202(a). *Johnson v. Jeddo-*

Highland Coal Co., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge