BRB No. 09-0246 BLA

DONALD HUITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUNNYSIDE COAL COMPANY	)	
	)	DATE ISSUED: 12/16/2009
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah H. Hurley (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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2005-BLA-06083) of Administrative Law Judge Donald W. Mosser with respect to a subsequent claim filed on September 13, 2004, 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] After crediting claimant with at least eighteen years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence established the existence of totally disabling coal workers' pneumoconiosis, and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge determined that the evidence, as a whole, established the existence of legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203 and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge applied the incorrect standard in finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). In addition, employer asserts that the administrative law judge erred in his findings at 20 C.F.R. §§718.202(a)(4), 718.203, 718.204(c), because he incorrectly weighed the medical opinion evidence and mechanically gave greater weight to the opinions of Drs. James and Badger, based on their status as treating physicians, in violation of 20 C.F.R. §718.104(d). Employer further argues that the administrative law judge failed to make a finding of total disability pursuant to 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief, asserting that the administrative law judge applied the appropriate standard in analyzing whether claimant proved a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). The Director further maintains, however, that the administrative law judge was mistaken when he indicated that the regulatory standard at 20 C.F.R. §718.204(c)(1) differs from the "contributing cause" standard enunciated by the United States Court of Appeals for the Tenth Circuit in *Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989).[2]

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[1] Claimant filed his initial claim on February 21, 2001. Director's Exhibit 1. It was denied by the district director on April 11, 2003, because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment or that he was totally disabled by the disease. *Id*. Claimant did not take any further action until he filed the present claim.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of at least eighteen years of coal mine employment and that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) or clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

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, and is in accordance with applicable law.[3] 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. Subsequent Claim Standard

In making his findings at 20 C.F.R. §725.309(d), the administrative law judge noted that he was required to consider all of the newly submitted evidence in order to determine whether claimant proved at least one of the elements of entitlement previously decided against him. Decision and Order at 3. Further, the administrative law judge stated that if claimant met this burden, he must then consider whether all of the evidence of record supports a finding of entitlement to benefits. *Id*.

Employer argues that the administrative law judge applied a standard that the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this claim arises, rejected in *Wyoming Fuel Company v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).[4] Claimant responds, stating that employer erroneously relies on the *Brandolino* duplicate claim standard, which the court adopted

[3] The record reflects that claimant's coal mine employment was in Utah. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The Tenth Circuit held in *Wyoming Fuel Company v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), that in determining whether a miner established a material change in condition under the prior version of 20 C.F.R. §725.309, the administrative law judge must apply a standard that prevents a miner from relitigating the previous denial of benefits, while still permitting proof that his or her condition has materially worsened since the earlier denial. *Brandolino*, 90 F.3d at 1509, 20 BLR at 2-315.

prior to the effective date of the revised regulations. Claimant further asserts that the Tenth Circuit recognized in *Energy West Mining Company v. Oliver*, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009), that the revised regulations replaced this standard, In his limited response brief, the Director argues that the administrative law judge's "application of the regulatory standard in this Tenth Circuit case was correct and should be affirmed." Director's Brief at 3.

We reject employer's contention and affirm the administrative law judge's application of 20 C.F.R. §725.309(d) in this case. As the Director and claimant accurately assert, in *Oliver*, the Tenth Circuit "supplanted" the material worsening test set forth in *Brandolino*.[5] *See Oliver*, 555 F.3d at 1223, 24 BLR at 2-173. In light of the administrative law judge's determination that the newly submitted evidence established a change in an applicable condition of entitlement, he applied the proper standard pursuant to 20 C.F.R. §725.309(d). Decision and Order at 3.

II. The Existence of Legal Pneumoconiosis

A. The Administrative Law Judge's Findings

The administrative law judge initially considered the newly submitted opinions of Drs. James, Badger, Repsher and Renn and noted that because they agreed that claimant does not suffer from clinical pneumoconiosis, he would limit his review of the evidence to whether claimant established the existence of legal pneumoconiosis. Decision and Order at 15. The administrative law judge determined that the opinions in which Drs. Repsher and Renn diagnosed congestive heart failure, and ruled out the presence of any coal dust related condition, were entitled to diminished weight because both physicians opined that claimant does not have chronic obstructive pulmonary disease (COPD), despite the numerous references to the condition in claimant's treatment records. *Id*.

With respect to Dr. Badger's opinion, that claimant's pulmonary condition is not related to his heart disease, the administrative law judge deferred to Dr. Badger's conclusions regarding claimant's cardiac condition because he has seen and treated claimant for cardiac conditions numerous times, and is the only Board-certified cardiologist of record. Decision and Order at 15. Further, the administrative law judge noted that Dr. Badger's opinion as to claimant's cardiac function is "greatly bolstered" by the heart catheterizations in the record, which Dr. Badger found to be essentially normal.

[5] In *Energy West Mining Company v. Oliver*, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009), the Tenth Circuit noted that the meaning and validity of 20 C.F.R. §725.309(d) are "open to question," but declined to engage in such an inquiry. *Oliver*, 555 F.3d at 1223, 24 BLR at 2-173.

Id. The administrative law judge also determined that, even if he found that claimant suffers from congestive heart failure, it would not mean that claimant does not also suffer from a coal mine dust-induced lung disease, as a miner can suffer from both COPD and congestive heart failure. *Id*. at 16.

The administrative law judge found Dr. James's opinion, that claimant suffers from COPD related to coal dust exposure, to be the most persuasive, reasonable and well supported, as evidenced by claimant's history of shortness of breath, phlegm production, cough, and airflow limitation on spirometry. Decision and Order at 16. The administrative law judge also noted that Dr. James ruled out other possible causes of claimant's COPD and treated the miner for his pulmonary conditions, as of the date of the hearing, so he "appears to have the best picture of the miner's complete medical condition." *Id*. The administrative law judge found that Dr. James's opinion, as supported by Dr. Badger's opinion, was entitled to greatest weight. *Id*.

The administrative law judge further found that the negative CT scan reading by Dr. Wiot, a Board-certified radiologist and B reader, did not outweigh the medical opinion evidence. Decision and Order at 16. The administrative law judge concluded by stating that he found the newly submitted medical opinion evidence sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. The administrative law judge also determined, therefore, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Id*. at 3, 16.

With respect to the merits of entitlement, the administrative law judge noted that in the sole medical opinion developed in conjunction with claimant's initial claim, Dr. Poitras opined that claimant has mild COPD due to coal dust exposure. Decision and Order at 16. Based on a review of the evidence as a whole, including the negative chest x-ray and CT scan evidence, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a). *Id*.

Because the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), he stated that it was not necessary for him to "separately determine the etiology of the disease at [20 C.F.R. §]718.203 because the findings at [20 C.F.R. §]718.202(a)(4) will necessarily subsume that inquiry." Decision and Order at 16, *citing Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Henley v. Cowan & Co.*, 21 BLR 1-147 (1999).

B. Arguments on Appeal

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Repsher and Renn under 20 C.F.R. §718.202(a)(4) because they failed to explain why claimant's coal mine employment history did not contribute to his

pulmonary symptoms. Employer further asserts that the administrative law judge did not apply the standard that the Tenth Circuit adopted in *Andersen*, regarding claimant's burden of proving that his respiratory impairment arose out of his coal mine employment.[6] *Andersen*, 455 F.3d at 1105, 23 BLR at 2-341.

Employer's contentions are without merit. The administrative law judge permissibly found that Dr. James's opinion regarding the cause of claimant's COPD was entitled to the greatest weight, as the administrative law judge rationally found that it was well reasoned and supported by the evidence of record. *Hansen v. Director, OWCP*, 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993); *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996). In making this determination the administrative law judge noted, in accordance with the Tenth Circuit's holding in *Andersen*, that Dr. James explained why claimant's COPD was due to coal dust exposure by excluding all other possible causes of the condition, referencing studies in support of the assertion that chronic exposure to coal mine dust causes an increased risk of COPD, and discussing the pulmonary function study results showing airflow limitation. *See Andersen*, 455 F.3d at 1105, 23 BLR at 2-341; Decision and Order at 15-16; Director's Exhibit 10, Claimant's Exhibit 1. Moreover, the administrative law judge acted within his discretion in according more weight to Dr. Badger's opinion, that there is no connection between claimant's heart disease and his pulmonary condition, because he is "the only [B]oard-certified cardiologist of record." Decision and Order at 15; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

We also reject employer's argument that the administrative law judge erred in giving more weight to the opinions of Drs. James and Badger, due to their status as treating physicians, because the administrative law judge mechanically applied a preference without adequately discussing the factors set forth in 20 C.F.R. §718.104(d). The administrative law judge found, consistent with 20 C.F.R. §718.104(d)(1)-(4), that Drs. James and Badger treated claimant on a regular basis for his pulmonary and cardiac conditions, respectively, and appeared to have a better understanding of claimant's

[6] In *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006), the Tenth Circuit held that, under the plain language of the revised regulation at 20 C.F.R. §718.201(a)(2), proving that one suffers from a "chronic obstructive pulmonary disease" does not establish legal pneumoconiosis unless one is able to show that the condition arose out of coal mine employment. *Andersen*, 455 F.3d at 1105, 23 BLR at 2-341. Thus, a claimant establishes the existence of legal pneumoconiosis only if he is able to prove, without the benefit of the rebuttable presumption at 20 C.F.R. §718.203, that his chronic pulmonary disease or respiratory or pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *Id*.

overall health. *See Oliver*, 555 F.3d at 1218, 24 BLR at 2-166; Decision and Order at 15-16. Further, employer's reliance upon the Board's decision in *Shupink v. LTV Steel Company*, 17 BLR 1-24 (1992), is misplaced. Unlike the physician in *Shupink*, Dr. James did not only submit a single report of a medical examination. *Shupink*, 17 BLR at 1-29-30. Rather, based on his treatment of claimant and a review of additional medical records, Dr. James prepared a supplemental report in which he opined that claimant's COPD and hypoxemia were due to his coal dust exposure. Claimant's Exhibit 1.

Employer also argues that the administrative law judge failed to consider whether the treatment records support Dr. James's opinion and did not explain why Dr. Badger's opinion regarding claimant's heart disease establishes that claimant's COPD is due to coal dust exposure. These contentions are without merit. The administrative law judge provided an analysis of the treatment records in his Decision and Order and highlighted the relevant portions, which included diagnoses of COPD, coronary artery disease, pulmonary hypertension, and notations that claimant's medical history included pneumoconiosis. *See* Decision and Order at 6. The administrative law judge also did not rely on Dr. Badger's opinion to find that the claimant has COPD due to coal dust exposure. Rather, he relied on it to discredit the opinions of Drs. Repsher and Renn, that claimant's impairment is due to congestive heart failure. *See* Decision and Order at 15-16. Finally, employer's arguments in this regard are tantamount to a request that the Board reweigh the evidence, which is not within our purview. *Hansen*, 984 F.2d at 370, 17 BLR at 2-49; *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39.

Consequently, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) based on the newly submitted evidence, and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In addition, we affirm the administrative law judge's finding that, based on a review of the evidence as a whole, claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), as Dr. Poitras, who provided the sole medical opinion in conjunction with claimant's initial claim, also indicated that claimant suffers from COPD due to coal dust exposure. *See Hansen*, 984 F.2d at 370, 17 BLR at 2-49; *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39.

We also reject employer's contention that the administrative law judge erred by failing to make a finding, pursuant to 20 C.F.R. §718.203(b), as to whether claimant's COPD arose out of his coal mine employment. As the administrative law judge correctly noted, the Tenth Circuit has held that it is unnecessary to make a separate finding regarding etiology at 20 C.F.R. §718.203 if the existence of legal pneumoconiosis is proven. *Andersen*, 455 F.3d at 1105, 23 BLR at 2-341; *see Kiser v. L&J Equipment Co.*, 23 BLR 1-246 (2006); *Henley*, 21 BLR at 1-151. Based upon his permissible finding that the opinion of Dr. James, as supported by the opinion of Dr. Badger, established the

existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), the administrative law judge was not required to make a separate finding regarding etiology at 20 C.F.R. §718.203. *Id*.

III. Total Disability and Total Disability Causation

A. The Administrative Law Judge's Findings

Regarding 20 C.F.R. §718.204(b), the administrative law judge stated that "[t]he parties have stipulated that claimant is totally disabled from his previous coal mine employment" so "[t]he issue that remains is whether the disability is due to pneumoconiosis." Decision and Order at 17. The administrative law judge found that claimant met his burden at 20 C.F.R. §718.204(c), concerning disability causation, based on the well-reasoned reports in which Drs. James and Badger indicated that claimant is totally disabled due to COPD related to coal dust exposure. *Id*. Because Drs. Repsher and Renn opined, contrary to the administrative law judge's finding under 20 C.F.R. §718.202(a)(4), that claimant does not suffer from any type of coal dust-related disease, the administrative law judge discounted their opinions that pneumoconiosis is not a contributing cause of claimant's total disability. *Id*. The administrative law judge found that the report in which Dr. Poitras did not definitively identify the source of claimant's obstructive impairment was not reasoned, so he assigned it little weight. *Id*. at 17. Based on a review of the evidence as a whole, the administrative law judge concluded that claimant met his burden of proving that he is totally disabled due to coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id*. at 17-18.

B. Arguments on Appeal

Employer contends that the administrative law judge erroneously found that the parties stipulated that claimant is totally disabled at 20 C.F.R. §718.204(b). While employer agrees that it stipulated that claimant is totally disabled, it claims that it did not stipulate that claimant is disabled by a pulmonary or respiratory impairment, as required by the regulations. Employer's contentions are without merit.

At the hearing, the following exchange occurred between Mr. Wilderman, the attorney for claimant, and Mr. Risse, employer's counsel:

> Mr. Wilderman: I'd like to propose a stipulation. Based upon his blood gas values, would the Respondent agree that [claimant] has a total disability from performing his last coal mine job as a fire boss because of his exercise hypoxemia?

> Mr. Risse: That would be correct. We really contend it's not his lungs – (inaudible).
>
> Mr. Wilderman: Well, isn't it his resting and his hypoxemia?
>
> Mr. Risse: And his hypoxemia, but primarily his exercise.
>
> Mr. Wilderman: Okay. With that stipulation, we should shortcut the testimony.

Hearing Transcript at 14-15. The administrative law judge acted within his discretion in determining that employer stipulated at the hearing that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), based on the blood gas studies of record. Employer's counsel acknowledged that all of claimant's blood gas studies produced qualifying values, but maintained that the cause of claimant's total disability was cardiac disease. However, the inquiry as to the cause of claimant's total disability is governed by 20 C.F.R. §718.204(c). We affirm, therefore, the administrative law judge's finding that employer stipulated that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Regarding 20 C.F.R. §718.204(c), employer raises essentially the same arguments that it raised concerning the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). While employer does not challenge the administrative law judge's discrediting of the causation opinions of Drs. Renn and Repsher for being contrary to his finding of legal pneumoconiosis, employer argues that the administrative law judge did not properly focus on whether Drs. James and Badger "'ruled in' coal dust as a substantially contributing or significantly aggravating factor." Employer's Brief at 18. In addition, employer asserts that the administrative law judge impermissibly assigned more weight to the opinions of Drs. James and Badger based on their status as treating physicians.

As the administrative law judge explained more fully at 20 C.F.R. §718.202(a)(4), he permissibly afforded the most weight to the opinion of Dr. James, that claimant's COPD is due to his coal dust exposure and contributed to his total disability from his previous coal mine employment, because it was well reasoned and supported by the evidence of record. *Hansen*, 984 F.2d at 370, 17 BLR at 2-49; *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Clark*, 12 BLR at 1-155; Director's Exhibit 10; Claimant's Exhibit 1; Decision and Order at 15-17. The administrative law judge also acted within his discretion in finding Dr. Badger's report to be well reasoned and in determining that it supported Dr. James's opinion because Dr. Badger stated that claimant's disabling pulmonary impairment is not due to his cardiac disease. *Hansen*, 984 F.2d at 370, 17

BLR at 2-49; *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Clark*, 12 BLR at 1-155; Claimant's Exhibit 4; Decision and Order at 15-17.

Further, contrary to employer's contentions, the administrative law judge permissibly afforded more weight to the opinions of Drs. James and Badger due to their status as treating physicians, based on an evaluation of the factors at 20 C.F.R. §718.104(d). *See Oliver*, 555 F.3d at 1218, 24 BLR at 2-166; Decision and Order at 15-16. As with its arguments at 20 C.F.R. §718.202(a)(4), employer is essentially asking the Board to reweigh the evidence, a task that falls within the sole discretion of the administrative law judge. *Hansen*, 984 F.2d at 370, 17 BLR at 2-49; *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39. Therefore, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c), that claimant it totally disabled due to legal pneumoconiosis.[7]

[7] We need not address the argument raised by the Director, Office of Workers' Compensation Programs, that the administrative law judge erred in stating that the standard set forth in 20 C.F.R. §718.204(c)(1) differs from the standard adopted by the Tenth Circuit in *Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989). Because the administrative law judge applied the correct standard in making his finding at 20 C.F.R. §718.204(c), error, if any, in the administrative law judge's characterization of the holding in *Mangus* is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 17.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge