

BRB No. 10-0215 BLA

RONALD M. PATRICK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TJS MINING, INCORPORATED)	
)	
and)	
)	
ROCKWOOD CASUALTY INSURANCE)	DATE ISSUED: 12/08/2010
COMPANY)	
)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5950) of Administrative Law Judge Thomas M. Burke (the administrative law judge) on a claim filed on September 19, 2006, 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). The administrative law judge found that the parties stipulated to 35.26 years of coal mine employment and that employer conceded that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge found that the evidence was insufficient to establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3), but found that the medical opinion evidence was sufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203, based on his finding of legal pneumoconiosis at Section 718.202(a)(4). The administrative law judge further found that the evidence established that claimant's totally disabling respiratory impairment was due to pneumoconiosis (disability causation) at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that that the administrative law judge erred in finding legal pneumoconiosis and disability causation established at Sections 718.202(a)(4) and 718.204(c),¹ based on his evaluation of the medical opinion evidence. Specifically, in support of its contention, employer argues that the administrative law judge mischaracterized the opinions of Drs. Fino and Kaplan and erred in finding them contrary to the Act and regulations. Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief in this case.

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.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe 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*

¹ Employer does not specifically refer to 20 C.F.R. §§718.202(a)(4) and 718.204(c). However, his arguments are relevant to the administrative law judge's findings thereunder. Employer's Brief at 1-7.

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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*).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated September 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of the 2010 amendments. *Patrick v. TJS Mining, Inc.*, BRB No. 10-0215 BLA (Sept. 13, 2010)(unpub. Order). The Director, claimant and employer have responded to the Board's Order. The Director contends that if the administrative law judge's decision awarding benefits is affirmed by the Board, remand of the case for consideration under Section 411(c)(4) would not be necessary. If, however, the Board does not affirm the award, the Director contends that the administrative law judge's decision must be vacated and the case remanded to the administrative law judge for consideration under Section 411(c)(4). The Director further contends that, since successful invocation of the Section 411(c)(4) presumption will alter the parties' burdens of proof, the administrative law judge should, on remand, allow for the submission of additional evidence. Claimant responds, agreeing with the Director that if the award of benefits is not affirmed, the case must be remanded for consideration at Section 411(c)(4). Employer contends that, even if the Board does not affirm the administrative law judge's award of benefits, the presumption at Section 411(c)(4) would not apply to this case, because the evidence does not establish a sufficient number of years of underground coal mine employment to invoke the presumption. Employer also argues that application of the Section 411(c)(4) presumption is unconstitutional as it violates employer's due process rights.

Legal Pneumoconiosis at 20 C.F.R. §718.202(a)(4)

In finding that the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinions of Drs. Begley and Schaaf, that claimant's chronic obstructive pulmonary disease (COPD) was due to both claimant's significant smoking history and significant coal dust exposure history. Specifically, the administrative law judge credited the opinions of Drs. Begley and Schaaf because "[e]ach physician thoroughly and persuasively explained how he

used the relevant medical evidence of record to reach his conclusion.” Decision and Order at 9. Turning to the contrary opinions of Drs. Fino and Kaplan, who opined that claimant’s COPD was due to cigarette smoking alone, the administrative law judge rejected their opinions because their findings, regarding the absence of legal pneumoconiosis, were contrary to the Act and regulations.³

Employer contends, however, that the administrative law judge erred in rejecting the opinions of Drs. Fino and Kaplan because the administrative law judge’s findings concerning their opinions “were not consistent with the actual testimony given by either doctor.”⁴ Employer’s Brief at 3. Regarding Dr. Fino’s opinion, employer contends that the administrative law judge incorrectly concluded that Dr. Fino’s opinion was based on generalized studies of coal miners, rather than on “[c]laimant’s own condition,” when, in fact, Dr. Fino explained his opinion based on the results of claimant’s pulmonary function study results. Employer’s Brief at 3. Contrary to employer’s contention, however, Dr. Fino’s deposition testimony contains multiple examples of Dr. Fino’s reliance on generalized studies to support his finding that claimant’s COPD was due to smoking, rather than coal mine employment. Specifically, Dr. Fino testified that the “rapid drop-off” in the FEV₁ results seen on claimant’s pulmonary function studies was something *not generally seen in impairment due to coal dust exposure*. Employer’s Exhibit 6 at 19. Further, when asked what role coal mine employment played in claimant’s COPD, Dr. Fino stated that “[e]pidemiologic studies have shown that just about all miners have some degree of loss of [FEV₁] due to coal dust.” Fino Deposition at 25. The doctor went on to explain that, based on “a bell shaped curve” covering all miners, he would not attribute claimant’s COPD to coal mine employment because claimant had only an average FEV₁ loss, compared to other miners. Fino Deposition at 25-26. Based on the foregoing, we conclude that the administrative law judge reasonably found, within his discretion as fact-finder, that Dr. Fino’s opinion, that claimant did not have legal pneumoconiosis, was impermissibly based on generalized studies, rather than on claimant’s specific condition. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see* 65 Fed. Reg. 79940-45 (Dec. 20, 2000).

³ In addition, the administrative law judge found that Dr. Bajwa’s opinion did not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), because the doctor did “not offer an opinion on whether...coal dust [was] a significant contributor to the [c]laimant’s [chronic obstructive pulmonary disease].” Decision and Order at 9.

⁴ Employer does not challenge the administrative law judge’s findings that the opinions of Drs. Begley and Schaaf were sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). These findings are, therefore, affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also contends that the administrative law judge erred in finding that Dr. Fino's opinion was based on his belief that "coal dust exposure must be found to have caused a pulmonary fibrosis significant enough to show opacities on an x-ray in order to be a cause of a disabling lung disease." Employer's Brief at 4. When asked the basis of his opinion regarding the absence of legal pneumoconiosis, Dr. Fino stated that his opinion was based, in part, on the absence of significant changes on claimant's x-rays. Fino Deposition at 28. Thus, the administrative law judge reasonably accorded less weight to Dr. Fino's opinion, that claimant did not have legal pneumoconiosis, because it was impermissibly based on negative x-ray evidence. *See* 20 C.F.R. §718.201; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 1-173 (4th Cir. 2000).

Employer contends that the administrative law judge similarly erred in rejecting the opinion of Dr. Kaplan, that smoking, not coal mine employment, was the cause of the miner's COPD. Contrary to employer's argument, however, the administrative law judge permissibly rejected the opinion of Dr. Kaplan, that claimant's COPD was due to smoking, not coal mine employment, because Dr. Kaplan testified that coal mine employment does not cause emphysema in the absence of a positive chest x-ray showing coal workers' pneumoconiosis. *See* 20 C.F.R. §718.201; 65 Fed. Reg. 79940-45 (Dec. 20, 2000); Kaplan Deposition at 17-18. The administrative law judge further permissibly rejected Dr. Kaplan's opinion, that claimant's COPD was due to smoking, not coal mine employment, because it was based on generalized findings concerning miners as a group. *See Tackett*, 12 BLR at 1-14. Specifically, the administrative law judge found that Dr. Kaplan opined that "generally we see small airway dysfunction in patients with category zero x-rays[,]not severe obstructive airways disease, and that because claimant had significant airflow obstruction, his emphysema was due to cigarette consumption, not coal mine employment. Kaplan Deposition at 19-20. Additionally, contrary to employer's argument, the administrative law judge properly rejected Dr. Kaplan's opinion because the doctor testified that COPD subsides in coal miners once they have left the mines. *See* 20 C.F.R. §718.201; Kaplan Deposition at 22, 25. We affirm, therefore, the administrative law judge's finding that the opinion of Dr. Kaplan, regarding the absence of legal pneumoconiosis, was entitled to less weight because it was impermissibly based on generalized studies and negative x-rays. *See* 20 C.F.R. §718.201; *Tackett*, 12 BLR at 1-14; 65 Fed. Reg. 79940-45 (Dec. 20, 2000). The administrative law judge also properly rejected Dr. Kaplan's opinion, that COPD subsides in coal miners after they have left the coal mines, as contrary to the Act and regulations. *See* 20 C.F.R. §718.201.

In conclusion, therefore, we affirm the administrative law judge's rejection of the opinions of Drs. Fino and Kaplan, that claimant did not have legal pneumoconiosis, because they were impermissibly based on generalized studies and negative x-ray findings. Further, in light of the administrative law judge's findings, the administrative law judge permissibly found that the opinions of Drs. Fino and Kaplan were contrary to

the Act and regulations. We, therefore, affirm the administrative law judge's finding that legal pneumoconiosis was established at Section 718.202(a)(4).

Disability Causation at 20 C.F.R. §718.204(c)

In finding disability causation established at Section 718.204(c), the administrative law judge credited the better reasoned opinions of Drs. Begley and Schaaf. Specifically, the administrative law judge stated:

In the discussion of whether [c]laimant had legal pneumoconiosis, the findings of Drs. Schaaf and Begley that Claimant's totally disabling chronic obstructive pulmonary disease was due, at least in substantial part, to coal dust exposure, were found to be reasoned and documented and, as previously explained, were credited over the opinions of Drs. Fino and Kaplan that Claimant's obstructive lung disease was due to his cigarette smoking but not his coal mine dust exposure. The finding that [c]laimant had legal pneumoconiosis, that is, that his chronic obstructive lung disease is caused by his coal dust exposure, and the finding that the obstructive lung disease disables him from performing his last coal mine job, equate to a finding that coal dust exposure was a substantial contributor to his pulmonary disability.

Decision and Order at 11. Employer has not challenged the administrative law judge's finding that the opinions of Drs. Begley and Schaaf establish disability causation at Section 718.204(c). The administrative law judge's findings regarding the opinions of Drs. Begley and Schaaf at Section 718.204(c) are, therefore, affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710. Further, because we have affirmed the administrative law judge's finding that legal pneumoconiosis was established at Section 718.202(a)(4), *see discussion infra*, we affirm the administrative law judge's rejection of the opinions of Drs. Fino and Kaplan, on the issue of disability causation, because they did not find legal pneumoconiosis established. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

In conclusion, we affirm the administrative law judge's findings that the evidence was sufficient to establish legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). We, therefore, affirm the administrative law judge's decision awarding benefits.

Because we affirm the administrative law judge's decision awarding benefits, we need not remand the case for consideration under Section 411(c)(4). 30 U.S.C. §921(c)(4); *see Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge