

BRB No. 10-0229 BLA

EMIL BUCHTAN)	
)	
Claimant- Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 12/23/2010
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 on Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 on Remand – Awarding Benefits (2006-BLA-5380) of Administrative Law Judge Michael P. Lesniak rendered on a 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). This case involves a miner’s claim that was filed on February 4, 2005, which is now before the Board for the second time. In his initial Decision and Order, the administrative law judge credited claimant with at least seventeen years of coal mine employment and adjudicated this claim pursuant to the regulatory provisions set forth at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

Claimant filed an appeal, challenging the administrative law judge’s finding that the evidence was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Board vacated the administrative law judge’s findings at 20 C.F.R. §718.202(a)(4) with respect to the opinions of Drs. Schaaf, Renn and Fino, and remanded the case for further consideration.¹ *E.B. [Buchtan] v. Consolidation Coal Co.*, BRB No. 08-0294 BLA, slip op. at 4 (Jan. 7, 2009) (unpub.). The Board instructed the administrative law judge, on remand, to determine whether Dr. Schaaf’s diagnosis of industrial bronchitis, with partial reversibility, is sufficient to establish the existence of legal pneumoconiosis and whether the opinion of Dr. Renn is contrary to the Act.²

¹ The Board affirmed, as unchallenged on appeal, the administrative law judge’s finding regarding the length of claimant’s coal mine employment, his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and his finding that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *E.B. [Buchtan] v. Consolidation Coal Co.*, BRB No. 08-0294 BLA, slip op. at 2 n.1 (Jan. 7, 2009) (unpub.).

² 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

In his Decision and Order on Remand, under 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinion of Dr. Schaaf, who opined that claimant's chronic obstructive pulmonary disease (COPD) is caused by coal dust exposure and diagnosed legal pneumoconiosis, over the contrary opinions of Drs. Renn and Fino. Decision and Order on Remand at 3. The administrative law judge further found that claimant is totally disabled due to his legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id* at 4. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer also maintains that the Director improperly raised an issue with respect to Dr. Renn's medical opinion in the previous appeal. Claimant responds, urging affirmance of the award of benefits. The Director has filed a letter brief, urging the Board to reject employer's arguments with respect to Dr. Renn's opinion, but states that he does not take a position on the merits of the administrative law judge's findings regarding entitlement in the instant 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.³ 33 U.S.C. §921(b)(3), as incorporated 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer initially contends that the Board erred in addressing the Director's contention that the administrative law judge overlooked the fact that Dr. Renn's medical opinion is in conflict with the Act. Employer contends that the Director's failure to raise

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 9.

this issue in a cross-appeal, instead of a response brief, precluded the Board from addressing it in the prior appeal. Employer's Brief at 10-11. The Director disagrees and maintains that, because Dr. Renn's medical opinion was inconsistent with the tenets of the Act and Dr. Renn's "faulty reasoning" was not recognized by the administrative law judge when he considered the evidence below, the Director permissibly raised the issue in support of remand in the prior appeal. Director's Letter Brief at 2.

Employer's contention is without merit. Pursuant to 20 C.F.R. §802.212(b), "arguments in response briefs shall be limited to those which respond to argument's raised in petitioner's brief." 20 C.F.R. §802.212(b). When claimant appealed the denial of benefits, he presented allegations of error concerning the administrative law judge's determination that Dr. Schaaf's opinion was insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In discrediting Dr. Schaaf's diagnosis of legal pneumoconiosis, the administrative law judge relied, in part, upon Dr. Renn's opinion that an impairment attributable to coal workers' pneumoconiosis is not reversible. 2007 Decision and Order at 13. Because claimant's arguments on appeal pertained to the administrative law judge's weighing of the medical opinions relevant to legal pneumoconiosis, the Director's assertions regarding Dr. Renn's opinion fall within what is permissible under 20 C.F.R. §802.212(b). See *Barnes v. Director*, OWCP, 19 BLR 1-71 (1995) (Decision and Order on Reconsideration) (*en banc*) (Smith, J., dissenting), *affirming in part and vacating in part* 18 BLR 1-55 (1994). Accordingly, the Director's contention regarding Dr. Renn's opinion was properly addressed in the prior appeal.

We will now address the administrative law judge's consideration of 20 C.F.R. §718.202(a)(4) on remand. The administrative law judge weighed the opinions of Drs. Schaaf, Renn and Fino. Dr. Schaaf performed an examination on March 2, 2006 and diagnosed moderate obstructive airways disease, due to chronic industrial bronchitis, resulting from coal mine employment. Claimant's Exhibit 1. In a post-hearing deposition on December 5, 2006, Dr. Schaaf testified that claimant had a significant response to bronchodilators, but would still be significantly impaired post-bronchodilator, and would not be able to perform the duties of his last work position as a pump mechanic or utility supply man. Employer's Exhibit 9. The doctor further stated that the cause of the pulmonary disability, both pre-bronchodilation and post-bronchodilation, is claimant's coal mine dust exposure, and that reversibility in pulmonary function study testing is seen in almost all cases of people who have significant active inflammation. *Id.*

Dr. Renn performed an examination on August 15, 2006, and diagnosed asbestos-induced pleural plaques and a moderately severe, significantly reversible, obstructive defect. Employer's Exhibit 6. Dr. Renn also diagnosed COPD, resulting in chronic bronchitis due to asthma and smoking, and determined that claimant does not have either clinical or legal pneumoconiosis. *Id.* Dr. Renn explained that the reversible chronic

obstructive disease pattern is inconsistent with coal mine dust-related disease and discussed how the disease is consistent with an asthmatic etiology and how the reversibility of the pulmonary function studies was inconsistent with coal workers' pneumoconiosis, which causes a fixed impairment. Employer's Exhibit 10.

Dr. Fino examined claimant on October 10, 2006, and diagnosed calcified pleural plaques consistent with previous asbestos exposure, a reduced diffusing capacity consistent with anatomic emphysema, and asthmatic bronchitis with reversibility. Claimant's Exhibit 5. He explained that the reversible component was not due to coal mine dust inhalation because coal mine dust-related disease is a permanent condition and does not improve with the administration of bronchodilators. *Id.* Dr. Fino also indicated that a very mild to mild obstructive defect, as well as a moderate reduction in diffusing capacity, remained following the administration of bronchodilators, along with a decrease in oxygen saturation on the six minute walk, indicative of anatomic emphysema. *Id.* Dr. Fino stated that he could not rule out coal mine employment as the cause for the anatomic emphysema and, thus, could not rule out legal pneumoconiosis as a cause of claimant's condition. *Id.*

In resolving the conflict in the medical opinions, the administrative law judge found that both Drs. Schaaf and Fino indicated that claimant has COPD in the form of chronic bronchitis, emphysema or asthma. Decision and Order on Remand at 4. The administrative law judge noted that, while Dr. Schaaf attributed claimant's COPD to his coal dust exposure and explained why claimant's smoking history would not have caused the impairment, Dr. Fino was vague as to the cause of claimant's asthma, but nonetheless indicated that he could not rule out coal mine employment as the cause of claimant's emphysema. *Id.* The administrative law judge concluded that claimant has COPD, as diagnosed by Drs. Schaaf and Fino, and found that claimant has legal pneumoconiosis, in light of his 30 pack-year smoking history, seventeen year coal mine employment history, all but one year of which was underground, Dr. Fino's finding of COPD and "Dr. Schaaf's well-reasoned and documented opinion." *Id.* The administrative law judge gave "less weight" to Dr. Fino's opinion regarding the cause of the COPD because it is "equivocal and not well-documented." *Id.* The administrative law judge accorded little weight to Dr. Renn's opinion, as he determined that it was in conflict with the regulations. The administrative law judge explained:

Dr. Renn indicates that legal pneumoconiosis is not progressive by concluding: If [claimant] had industrial bronchitis, it would have begun early on in his exposure to coal mine dust and it would have continued throughout the time that he was exposed to coal mine dust and then disappeared completely within six months to a year after he was no longer exposed, and that's not the history. The history is that it is continuing. [Employer's Exhibit 10 at 21.] This medical opinion is not well-reasoned

and contradicts the [r]egulations, the comments to which state that “it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period of time.” Department of Labor’s Comments to the Amended Regulations, 65 Fed. Reg. at 79971; *see* also 20 C.F.R. §718.201(c). Thus, I discredit Dr. Renn’s opinion because he denies that legal pneumoconiosis can be latent and progressive.

Id. Accordingly, the administrative law judge gave controlling weight to the opinion of Dr. Schaaf and found that claimant satisfied his burden to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge then relied upon his weighing of the medical opinion evidence to determine that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

Employer asserts that the administrative law judge erred in finding that the opinion of Dr. Schaaf is sufficient to satisfy claimant’s burden of proving that he has legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer maintains that, in crediting Dr. Schaaf’s opinion, the administrative law judge relied upon the assumption that any irreversible respiratory or pulmonary impairment must be attributable to coal dust exposure.⁴ We disagree. Contrary to employer’s suggestion, the administrative law judge rationally concluded that Dr. Schaaf’s diagnoses of chronic bronchitis and a disabling obstructive impairment, both caused by coal dust exposure, were well-reasoned and well-documented and satisfied the definition of legal pneumoconiosis, which “includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2); Decision and Order on Remand at 4; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

⁴ We reject employer’s accompanying assertion, that the administrative law judge’s crediting of Dr. Schaaf’s opinion cannot be affirmed, as the administrative law judge determined erroneously that Dr. Schaaf diagnosed a restrictive impairment. After indicating that Dr. Schaaf’s opinion contained diagnoses of chronic bronchitis and moderate obstructive airways disease, the administrative law judge stated, “[w]hile [c]laimant’s *restrictive* lung disease improves after administering bronchodilators, the small reversibility is consistent with [COPD], and therefore, legal pneumoconiosis.” Decision and Order on Remand at 3 (emphasis added). The administrative law judge’s then noted, “a [c]laimant can have legal pneumoconiosis if he can establish that he suffers from . . . COPD as a result of his coal mine employment.” *Id.* When read in this context, therefore, it is apparent that the administrative law judge intended to refer to claimant’s *obstructive* lung disease, rather than his restrictive lung disease. *See* Employer’s Exhibit 9 at 70.

Employer next argues that the administrative law judge erred in rejecting the opinions of Drs. Renn and Fino. This contention is without merit. The administrative law judge rationally determined that Dr. Renn's opinion, that any industrial bronchitis suffered by claimant would have disappeared when he left the mines, is entitled to less weight than Dr. Schaaf's opinion, as it is inconsistent with 20 C.F.R. §718.201(c), which recognizes that pneumoconiosis "is a latent and progressive disease that may first become detectable only after the cessation of coal dust exposure." 20 C.F.R. §718.201(c); *see Workman v. Eastern Assoc. Coal Corp.*, 23 BLR 1-22 (2004) (*en banc*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc*). The administrative law judge also reasonably found Dr. Fino's opinion, that claimant does not have a respiratory condition due to coal dust exposure, to be unpersuasive, as "Dr. Fino was vague as to the cause of [c]laimant's asthma, and indicated that he cannot rule out coal mine employment as the cause of [c]laimant's emphysema." Decision and Order on Remand at 4; *Balsavage*, 295 F.3d at 396-397, 22 BLR at 2-396; *Clark*, 12 BLR at 1-153. We therefore affirm, as supported by substantial evidence, the administrative law judge's credibility determinations, and his finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Balsavage*, 295 F.3d at 396-397, 22 BLR at 2-396; *Clark*, 12 BLR at 1-153.

Lastly, we reject employer's assertion that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge relied upon the appropriate credibility determinations he made under 20 C.F.R. §718.202(a)(4) to find that Dr. Schaaf provided a well-reasoned and documented opinion, that claimant's totally disabling respiratory impairment was caused by his coal dust exposure. *Balsavage*, 295 F.3d at 396-397, 22 BLR at 2-396; *Clark*, 12 BLR at 1-153; Decision and Order on Remand at 4. Therefore, we affirm the administrative law judge's finding, at 20 C.F.R. §718.204(c), that claimant is totally disabled due to legal pneumoconiosis.⁵

⁵ Based on our affirmance of the administrative law judge's award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 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)). We also decline to address employer's allegation that the administrative law judge's discrediting of Dr. Ewald's opinion deprived claimant of a complete pulmonary examination and, therefore, remand would deny employer due process, Employer's Brief at 10, as it has been rendered moot by our affirmance of the award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge