BRB No. 08-0361 BLA

J.V.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHANNOPIN MINING COMPANY	)	
	)	
and	)	DATE ISSUED: 02/25/2009
	)	
THE FIRE AND CASUALTY COMPANY OF CONNECTICUT	)	
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Raymond R. Keisling (Carpenter, McCadden & Lane, LLP), Wexford, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5293) of Administrative Law Judge Michael P. Lesniak awarding benefits 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 involves a claim filed on February 7, 2006. After noting that the parties stipulated that claimant had over forty years of coal mine employment,[1] the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis. Employer also contends that the administrative law judge erred in finding that the evidence established that claimant is totally disabled due to legal pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 under 20 C.F.R. Part 718 in a living miner's claim, 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

Legal Pneumoconiosis

Employer initially argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis.[2] The administrative law judge considered the medical opinions of Drs. Martin, Begley, Schaaf, and Renn. Drs. Martin, Begley, and Schaaf diagnosed, *inter alia*, chronic bronchitis attributable to claimant's coal dust exposure. Director's Exhibit 13; Claimant's Exhibits 2, 5. Dr. Renn also diagnosed chronic bronchitis, but opined that it was not due to claimant's coal dust exposure. Director's Exhibit 17; Employer's Exhibit 1. Dr. Renn opined that claimant's symptoms, specifically his chronic cough, could be the result of congestive heart failure, obesity, asthma, or hypertension medication. *Id.*

In his consideration of the conflicting evidence, the administrative law judge credited the opinions of Drs. Begley and Schaaf, that claimant's chronic bronchitis was attributable to his coal mine employment, over Dr. Renn's contrary opinion because he found that their opinions were well-reasoned and documented and were more consistent with claimant's symptomatology and medical and work histories.[3] The administrative law judge found that Dr. Renn's opinion was entitled to less weight because it was not supported by the underlying medical evidence.[4] Consequently, the administrative law

[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).

[3] Dr. Martin acknowledged that his conclusions might change if he had been able to review claimant's cardiac records. Employer's Exhibit 4. Because the record contains a significant number of cardiac records that Dr. Martin did not review, the administrative law judge found that Dr. Martin's opinion was entitled to less weight. Decision and Order at 12. The administrative law judge also noted that Dr. Martin is less qualified than are Drs. Begley, Schaaf, and Renn. *Id.* While Drs. Begley, Schaaf, and Renn are Board-certified in Internal Medicine and Pulmonary Disease, Dr. Martin is Board-certified in Internal Medicine only.

[4] The administrative law judge questioned the underlying basis for the alternative etiologies that Dr. Renn provided for claimant's chronic cough. Decision and Order at 11-12. The administrative law judge noted that Drs. Begley, Schaaf, and Martin indicated that claimant was not in congestive heart failure at the time of their physical examinations. The administrative law judge also noted that Drs. Schaaf and Martin stated that claimant's degree of obesity was not sufficient to account for his pulmonary problems. Although Dr. Begley acknowledged that obesity could result in a decreased forced vital capacity, the administrative law judge stated that Dr. Begley opined that claimant's chronic bronchitis was not related to his obesity. As for Dr. Renn's theory that asthma caused claimant's symptoms, the administrative law judge observed that Dr.

judge found that the medical opinion evidence established the existence of legal pneumoconiosis, *i.e.*, chronic bronchitis due to coal dust exposure, pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge did not correctly evaluate claimant's testimony regarding his usual coal mine employment.[5] Employer asserts that claimant's testimony shows that claimant entered the mines only when there was a breakdown or a pump failure, and that claimant did not indicate how often a pump failure would occur.[6] Employer also notes that claimant testified that he would wear a respirator in the mines. From claimant's testimony, employer appears to conclude that claimant's coal dust exposure was far less than that of a miner performing continuous physical labor in an operating mine, which the "physicians were led to believe . . ." was claimant's situation. Employer's Brief at 7.

Renn admitted that there was not enough objective data to diagnose asthma prior to 2006. This is significant because claimant had taken breathing medication since 1982. Decision and Order at 3. The administrative law judge also observed that Dr. Renn admitted that he was unaware of when claimant began taking the hypertension medication that he believed could have produced claimant's cough. In addition, the administrative law judge stated that Drs. Begley, Martin, and Schaaf all disagreed with Dr. Renn's opinion that claimant's symptoms could not have been due to his coal mine employment because they continued after claimant ceased his coal mine employment.

[5] Claimant testified that he worked for forty-three years in coal mine employment and that his last coal mine job was as a maintenance foreman and mine electrician. Hearing Transcript (Tr.) at 13. Claimant testified that his main responsibility was "keeping all the equipment running." Tr. at 14. As part of his job duties, claimant would "make sure all of [his] papers [were] up to date." *Id.* If a motor went out, claimant testified that he, and a couple of other mechanics, would change the motor. *Id.* Claimant was required to "set chain blocks and hoist the component pins." Tr. at 15. He would have "to carry cribbing blocks and block the head up." *Id.* The material and cribbing would weigh fifty to one-hundred pounds. *Id.* Claimant also testified that if the pumps shut down, he would have to put on a wetsuit and fix the problem. In water up to his chin and with a piece of timber to help him float, claimant would have to "walk in slag" for 500 to 600 feet. Tr. at 17. Claimant added that the dust conditions in the mine were "pretty bad." Tr. at 18.

[6] Employer points out that claimant testified motor breakdowns would occur about two times per week. Tr. at 16.

We initially note that employer does not substantiate its argument by citation to any medical opinion. Moreover, in its post-hearing brief, employer noted, without contradiction, that claimant described the dust conditions in the mines as "pretty bad" and employer did not argue that any of the physicians based their opinions on an inaccurate understanding of the extent or duration of claimant's coal dust exposure. Consequently, the administrative law judge understandably did not address whether the physicians of record relied upon an accurate coal mine employment history. Because employer failed to raise the issue before the administrative law judge, any objection it has to the medical opinion evidence based upon a misunderstanding of claimant's coal dust exposure has been waived. *See generally Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989).

Employer also argues that the administrative law judge should have accorded less weight to the opinions of Drs. Begley and Schaaf regarding the existence of legal pneumoconiosis because these doctors diagnosed clinical pneumoconiosis, a finding in conflict with that of the administrative law judge. Employer's contention has no merit. An administrative law judge is not required to discredit a medical opinion of legal pneumoconiosis which is based in part on a positive x-ray where the administrative law judge has found the weight of the x-ray evidence to be negative. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002). In this case, Drs. Begley and Schaaf diagnosed both clinical and legal pneumoconiosis. Employer has not explained how the fact that the administrative law judge found that the evidence did not establish clinical pneumoconiosis undermines the diagnoses of legal pneumoconiosis rendered by Drs. Begley and Schaaf. In fact, Dr. Begley explicitly opined that, even if claimant's x-ray were completely normal and not supportive of a finding of clinical pneumoconiosis, it would not alter his opinion that claimant suffers from legal pneumoconiosis in the form of chronic bronchitis arising out of coal mine employment.[7] Claimant's Exhibit 5 at 25.

Employer also argues that the administrative law judge erred in crediting Dr. Begley's opinion since Dr. Begley did not diagnose the existence of chronic bronchitis in his first report. Although Dr. Begley did not diagnose chronic bronchitis in his November 10, 2005 report, he subsequently explained that, after reviewing the interrogatory that claimant provided, he found that claimant's complaints were consistent with chronic bronchitis. Claimant's Exhibit 5 at 26. The administrative law judge

[7] Employer notes that Drs. Begley and Schaaf did not agree as to whether claimant had a restrictive lung disease or an obstructive lung problem. Drs. Begley and Schaaf, however, agreed that claimant suffered from chronic bronchitis caused by his coal dust exposure, the relevant issue before the administrative law judge at 20 C.F.R. §718.202(a)(4).

acknowledged that Dr. Begley did not initially diagnose chronic bronchitis, but after further review of the evidence, he found that the disease existed.[8] We therefore reject employer's argument that the administrative law judge erred in crediting Dr. Begley's diagnosis of chronic bronchitis.

Employer next asserts that Dr. Begley's statement, that even if claimant's chronic bronchitis did not develop for several years after his cessation of coal mine employment, it would still be attributable to coal dust exposure, is "on its face . . . an unreasonable medical conclusion." Employer's Brief at 9. A determination of whether a medical opinion is reasoned is committed to the discretion of the administrative law judge. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). Further, pneumoconiosis has been "recognized as a latent and progressive disease which may first become detectable only after the cessation of coal dust exposure." 20 C.F.R. §718.201(c); *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10, 22 BLR 2-467, 2-478-79 (3d Cir. 2002) (recognizing the pneumoconiosis is a latent and progressive disease). Employer provides no medical or legal support for its assertion that Dr. Begley's opinion is unreasonable. The assertion is therefore rejected.

We also disagree with employer's assertion that Drs. Begley and Schaaf ignored the possible diagnosis of asthma. There is no evidence that Drs. Begley and Schaaf ignored the possibility of asthma in this case. Although in his November 10, 2005 report, Dr. Begley did not list a history of asthma, during a November 14, 2007 deposition, Dr. Begley testified that claimant had not provided him with any history, by way of symptom complex, to support a diagnosis of asthma.[9] Director's Exhibit 12; Claimant's Exhibit 5 at 23. In his February 1, 2007 report, Dr. Schaaf noted that "[a] doctor [had] told [claimant] that he had asthma beginning back in the late '80s." Claimant's Exhibit 2.

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[8] Additionally, the existence of chronic bronchitis is not in dispute since all of the physicians, including Dr. Renn, found that claimant suffers from the disease.

[9] Dr. Begley explained what was necessary to support a diagnosis of asthma:

> You would be looking for episodic attacks with wheezing and shortness of breath with appropriate treatment there of the asthma resulting in resolution of the symptoms and the pulmonary functions. In addition, remember, [claimant] has chronic bronchitis and asthma doesn't cause chronic bronchitis.

Claimant's Exhibit 5 at 23.

However, during a June 29, 2007 deposition, Dr. Schaaf stated that asthma was not an appropriate diagnosis in this case.[10] Claimant's Exhibit 4 at 28.

Employer finally contends that the administrative law judge erred in his consideration of Dr. Renn's opinion, an opinion that employer characterizes as "the only reasoned, credible opinion." Employer's Brief at 11. Employer, however, alleges no specific error in regard to the administrative law judge's consideration of Dr. Renn's opinion. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of chronic bronchitis arising out of coal mine employment exposure, pursuant to 20 C.F.R. §718.202(a)(4).

Weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Williams*, 114 F.3d at 23, 21 BLR at 2-108; Decision and Order at 12. Because no party challenges this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Total Disability

Employer also challenges the administrative law judge's finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In his consideration of whether the evidence established total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge considered the opinions of Drs. Martin, Begley, Schaaf, and Renn. While Drs. Martin, Begley, and Schaaf opined that claimant was totally disabled from a pulmonary standpoint, Director's Exhibits 12, 13; Claimant's Exhibits 2, 4, 5; Employer's Exhibit 4, Dr. Renn opined that claimant was not totally disabled from returning to his coal mine employment. Employer's Exhibit 1. After finding that Dr. Martin's opinion was not sufficiently reasoned, the administrative law

[10] Dr. Schaaf explained that:

> [Claimant] doesn't have much episodicity to his disease. He has a little bit of wheezing, that's not the dominant part of his disease process, far more cough and sputum production, far better fits the diagnosis of chronic bronchitis.

Claimant's Exhibit 4 at 29.

judge found that the opinions of Drs. Schaaf and Begley were better reasoned and documented than Dr. Renn's contrary opinion. Decision and Order at 13. The administrative law judge noted that Drs. Schaaf and Begley both explained that claimant's pulmonary function and arterial blood gas study results were abnormal and demonstrated impairment, regardless of whether those results qualified under the federal standards. *Id.* The administrative law judge found that Dr. Renn's opinion was undermined by his disregard of claimant's symptoms and complaints in evaluating claimant's level of disability. *Id.* The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues that Dr. Begley's opinion that claimant is totally disabled was based upon his belief that "a return to serious dust exposure would be injurious to [claimant]." Employer's Brief at 8. In support of its argument, employer relies upon the following answer that Dr. Begley provided during his November 14, 2007 deposition:

> [When] one looks at disability, one has to look at a specific individual and their ability to return to their previous job duties. And as I already mentioned earlier, a reasonable person would come to the conclusion that with [claimant's] subjective complaints confirmed by objective criterion and with the diagnosis of chronic bronchitis, that it would be further injurious to [claimant] to return him to an environment where he would be exposed to more coal dust.

Claimant's Exhibit 5 at 30-31.

A doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). However, Dr. Begley's opinion was not limited to a recommendation against further dust exposure. The administrative law judge properly credited Dr. Begley's earlier deposition testimony that claimant "would be incapable of returning to his previous employment in the coal mining industry." Claimant's Exhibit 5 at 15. Moreover, in his November 10, 2005 report, Dr. Begley opined that claimant was totally disabled from a pulmonary standpoint, stating that:

> [Claimant] suffers from a pulmonary impairment. This conclusion is based upon the aforementioned abnormal pulmonary function studies as well as his abnormal resting and exercised blood gases.
>
> [Claimant] would be incapable of returning to his previous employment in the coal mining industry. Specifically, his pulmonary impairment as documented by his pulmonary function studies and resting and exercised

> [sic] arterial blood gases would preclude him from being capable of returning to his previous duties as a maintenance foreman which would require moderate physical activity.

Director's Exhibit 12.

Employer's argument is rejected.

Employer finally contends that Dr. Renn's opinion was "the only reasoned, credible opinion . . . ." Employer's Brief at 11. However, employer again alleges no error in regard to the administrative law judge's consideration of Dr. Renn's opinion. *See Cox*, 791 F.2d at 445, 9 BLR at 2-46; *Sarf*, 10 BLR at 1-120. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because no party challenges the administrative law judge's finding that all of the relevant evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack*, 6 BLR at 1-711.

Total Disability Due to Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[11] In considering whether claimant's total disability is due to legal pneumoconiosis, the administrative law judge accorded the most weight to

[11] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) 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).

the opinions of Drs. Schaaf and Begley that claimant's chronic bronchitis, arising from coal dust exposure, resulted in a demonstrated pulmonary impairment that would prevent claimant from performing his last coal mine job. Decision and Order at 14. The administrative law judge accorded less weight to Dr. Renn's opinion because he did not diagnose the existence of legal pneumoconiosis. *Id.* The administrative law judge, therefore, found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

Employer contends that it is "obvious that both Dr. Begley and Dr. Schaaf, in forming their opinions that [claimant] was disabled due to coal workers' pneumoconiosis, were basing their opinion[s] in part [on the fact] that [claimant] had clinical coal workers' pneumoconiosis." Employer's Brief at 8. Employer provides no support for its contention. In fact, Dr. Begley opined that claimant, independent of his clinical pneumoconiosis, would be totally disabled as a result of his legal pneumoconiosis. Claimant's Exhibit 5 at 20. Dr. Begley opined that claimant's legal pneumoconiosis was a substantial contributing factor to his pulmonary disability. *Id.* at 19. Dr. Schaaf also opined that claimant's legal pneumoconiosis contributed to his pulmonary disability. Claimant's Exhibit 4 at 17.

Further, the administrative law judge permissibly accorded less weight to Dr. Renn's opinion because it was based on a faulty premise, that claimant did not suffer from legal pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Clites v. J & L Steel Co*., 663 F.3d 14, 3 BLR 2-86 (3d Cir. 1981); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986)*; see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

_____
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