BRB No. 08-0433 BLA

G.V. Claimant-Respondent v. ESSENTIAL FUELS, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/27/2009 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5280) of Administrative Law Judge Larry W. Price rendered 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, based on claimant's November 15, 2005 filing date, the administrative law judge reviewed the evidence of record and credited claimant with twenty-six years of coal mine employment. Addressing the elements of entitlement, the administrative law judge found that, on weighing all of the evidence together, the medical opinion evidence of record was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[1] The administrative law judge further found that the medical evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's decision awarding benefits, arguing that the administrative law judge erred in weighing the medical opinion evidence and finding that it established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In response, claimant urges affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response unless requested to do so by the Board.[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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] "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); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-six years of coal mine employment, his finding that the medical evidence is insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or his finding that claimant has established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). These findings, therefore, are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

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, 718.201, 718.202, 718.203, 718.204; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In challenging the administrative law judge's finding at Section 718.202(a)(4), employer contends that the administrative law judge erred in his analysis of the conflicting medical opinions. In particular, employer contends that the administrative law judge erred in finding that the opinions of Drs. Rasmussen and Gaziano supported a finding of legal pneumoconiosis. Employer's Brief at 4, 7. Specifically, employer contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion because Dr. Rasmussen failed to apportion the amount of respiratory impairment that was due to smoking as opposed to coal mine employment, when he found that claimant's emphysema was due to both conditions. Employer's Brief at 5. In addition, employer argues that Dr. Rasmussen's reasoning is contrary to the Act and to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer asserts that, in failing to differentiate between the causative factors of claimant's impairment, Dr. Rasmussen's opinion was, in essence, based on a presumption of legal pneumoconiosis. Regarding the opinion of Dr. Gaziano, employer contends that the administrative law judge erred in finding that Dr. Gaziano diagnosed the existence of legal pneumoconiosis. Employer asserts that Dr. Gaziano's opinion that claimant's emphysema was due, in part, to his coal dust exposure, was based on positive x-ray and CT scan evidence, which establish the existence of clinical pneumoconiosis, not legal pneumoconiosis. *Id*. at 6.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen and Gaziano, who found that claimant's emphysema was related to both cigarette smoking and coal mine dust exposure. The administrative law judge also considered the contrary opinions of Drs. Crisalli and Zaldivar, who found that claimant's respiratory impairment was related solely to cigarette smoking and not to his coal mine dust exposure. The administrative law judge found the opinions of Drs. Rasmussen and Gaziano entitled to greater weight than the contrary opinions of Drs. Crisalli and Zaldivar. In particular, the administrative law judge accorded the greatest weight to the opinion of Dr. Rasmussen because 1) it was more thoroughly explained; 2) it was better supported by the medical evidence in the record; and 3) it was based on, and supported by, medical literature. Decision and Order at 14. The administrative law judge also found that Dr. Gaziano's opinion was well-reasoned and based on objective

evidence. *Id*. Consequently, the administrative law judge found the medical opinion evidence sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

We reject employer's allegations of error. Claimant is not required to demonstrate that his coal mine dust exposure was a more substantial cause of his chronic respiratory impairment than cigarette smoking, in order to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §718.201. Even though a physician cannot establish the precise percentage of lung obstruction attributable to cigarette smoke and coal mine dust exposure, such exact findings are not required for claimant to establish that his chronic respiratory impairment arose, in part, out of coal mine employment.[4] *See Williams*, 453 F.3d at 622, 23 BLR at 2-372. Accordingly, contrary to employer's contention, the administrative law judge did not err in crediting the opinion of Dr. Rasmussen, finding that claimant's emphysema was due to both smoking and coal mine employment, because he failed to apportion the amount of claimant's respiratory impairment that was due to cigarette smoking, as opposed to that due to coal mine dust exposure. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372; *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000) (miner is not required to demonstrate that coal dust is the *only* cause of his respiratory problems).

Further, contrary to employer's contention, Dr. Rasmussen's failure to apportion the percentage of respiratory impairment due to each of the causative factors of claimant's respiratory impairment, *i.e.*, smoking and coal dust exposure, does not render his opinion contrary to the Act or the requirements of the APA. Contrary to employer's argument, Dr. Rasmussen's failure to make such an apportionment does not imply that the doctor applied a presumption of legal pneumoconiosis, based on the fact that claimant had a respiratory impairment and a lengthy history of coal mine employment. As the administrative law judge found, Dr. Rasmussen set forth the rationale for his opinion based on his interpretation of the medical evidence of record, and concluded that claimant's respiratory impairment was due to both smoking and coal dust exposure, specifically stating that claimant's coal dust exposure "remains a material contributing cause of his disabling lung disease." Claimant's Exhibit 9; *see* Director's Exhibit 13; Claimant's Exhibit 3. Therefore, contrary to employer's contention, Dr. Rasmussen's opinion is not, on its face, contrary to the Act, or the requirements of the APA. 20 C.F.R

[4] The administrative law judge considered the entirety of Dr. Rasmussen's opinion, including his explanation as to why both coal dust exposure and cigarette smoking were causative factors in claimant's emphysema, *i.e.*, because they cause identical forms of emphysema, it is difficult to differentiate between these causative factors. Claimant's Exhibit 3; *see* also Director's Exhibit 13; Claimant's Exhibit 9.

§718.201; *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *see Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997. Furthermore, contrary to employer's argument, a medical opinion itself is not, *per se*, contrary to the requirements of the APA, as the APA governs the practice and procedures of administrative proceedings and not the individual evidentiary submissions in those proceedings. In this case, the administrative law judge properly evaluated Dr. Rasmussen's opinion and found that his opinion supported a diagnosis of legal pneumoconiosis.

Likewise, the administrative law judge properly found that Dr. Gaziano's opinion, which was based on x-ray and CT scan evidence of emphysema, as well as pulmonary function studies and blood gas studies showing significant "arterial oxygen desaturation and mild diffusion impairment," supported a finding of legal pneumoconiosis. Decision and Order at 13. Contrary to employer's argument, the administrative law judge properly found that the evidence relied on by Dr. Gaziano supported a finding of "legal" pneumoconiosis, not "clinical" pneumoconiosis, *i.e.*, the x-ray and CT scan evidence showed emphysema, and pulmonary function and blood gas studies supported the doctor's diagnosis that claimant's respiratory impairment arose out of coal mine employment. In conclusion, therefore, the administrative law judge reasonably found that both Drs. Gaziano and Rasmussen provided well-reasoned and well-documented opinions supportive of a finding of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); *see Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999). Accordingly, we affirm the administrative law judge's finding that the opinions of Drs. Rasmussen and Gaziano support a finding of legal pneumoconiosis at Section 718.202(a)(4).

Employer also contends that the administrative law judge inappropriately relied on the holding of the United States Court of Appeals for the Fourth Circuit in *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. May 11, 2004) (unpub.), to discredit the opinions of Drs. Crisalli and Zaldivar. Employer's Brief at 7-8. In *Swiger*, the Fourth Circuit held the presence of a residual impairment on a pulmonary function study, even after the administration of a bronchodilator, can still, based on the evidence of record, show that coal mine dust was a contributing cause of claimant's respiratory impairment. Employer contends that it does not assert that the reversibility of claimant's respiratory impairment rules out the presence of legal pneumoconiosis. Rather, employer asserts that it is a factor that should be considered by the administrative law judge in weighing the medical opinion evidence.

In this case, the administrative law judge properly accorded less weight to Dr. Crisalli's opinion, that smoking was the only cause of claimant's respiratory impairment,

because the doctor failed to adequately explain how claimant's "mild post bronchodilator obstruction or lack of diffusion impairment" eliminated coal dust exposure as a potential causative factor of his respiratory impairment. Decision and Order at 14. Likewise, the administrative law judge properly found that Dr. Zaldivar's opinion regarding the variable nature of claimant's obstructive impairment did not preclude a finding of legal pneumoconiosis.[5] *See Swiger*, 98 Fed. Appx. 227; *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], Case No. 08-1232 (4th Cir. Apr. 5, 2004)(unpub.); *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995) (Decision and Order on Reconsideration)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

The administrative law judge also rationally concluded that he was more persuaded by Dr. Rasmussen's opinion rebutting Dr. Zaldivar's opinion, as the basis for Dr. Rasmussen's opinion was more thorough and better explained. Decision and Order at 12, 13; Claimant's Exhibits 3, 9; Employer's Exhibits 1, 2, 9; *see Swiger*, 98 Fed. Appx. 227; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Clark*, 12 BLR at 1-155. Accordingly, the administrative law judge properly accorded less weight to the opinions of Drs. Crisalli and Zaldivar on the issue of legal pneumoconiosis.

Consequently, there is no merit to employer's allegations of error in the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4). The administrative law judge, as the trier-of-fact, has the discretion to render credibility determinations that are supported by substantial evidence. We, therefore, affirm his decision to accord greater weight to the opinions of Drs. Rasmussen and Gaziano on the issue of legal pneumoconiosis at Section 718.202(a)(4), as it is rational, supported by substantial evidence, and in accordance with the law. 20 C.F.R §§718.201, 718.202(a)(4); s*ee Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Clark*, 12 BLR at 1-155; *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As employer has not otherwise challenged the administrative law judge's findings on the merits of entitlement, we affirm the administrative law judge's award of benefits pursuant to Part 718.

[5] The administrative law judge specifically noted that because the pulmonary function tests show that, at times, "a mild residual, though nonqualifying obstruction remains after bronchodilation," Dr. Zaldivar's opinion, attributing claimant's respiratory condition entirely to smoking, is accorded less weight. Decision and Order at 13, citing *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. May 11, 2004) (unpub.).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge