BRB No. 09-0382 BLA

NICK MARVIDAKIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	DATE ISSUED: 02/18/2010
	)	
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 Awarding Living Miner's Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman, Denver, Colorado, for claimant.

William J. Evans and Susan Baird Motschiedler (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits (2005-BLA-5718) of Administrative Law Judge Jennifer Gee rendered on a subsequent 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). Upon stipulation of the parties, the administrative law judge credited claimant with thirty years of qualifying coal mine employment, and adjudicated this subsequent claim,[1] filed on February 18,

[1] Claimant's initial claim for benefits, filed on June 29, 1973, was denied by the Social Security Administration on September 14, 1973. Under the 1977 Amendments to

2004, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found the newly submitted evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R.§725.309(d). Considering the entire record, the administrative law judge found the evidence insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.107, but sufficient to establish the existence of legal pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the evidence on the issues of the existence of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. Employer has replied in support of its position. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.[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).

Employer challenges the administrative law judge's determination that legal pneumoconiosis was established at Section 718.202(a)(4), arguing that such a finding is not supported by substantial evidence, and that the administrative law judge applied an incorrect standard for determining the presence of legal pneumoconiosis. Employer

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the Act, the claim was re-opened and re-adjudicated by the Department of Labor pursuant to 20 C.F.R. Part 727. Claimant, without good cause, failed to undergo a required medical examination, and his claim was denied by reason of abandonment under 20 C.F.R. §725.409. Director's Exhibit 1; Decision and Order at 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d); and that the evidence was insufficient to establish clinical pneumoconiosis at 20 C.F.R. §§718.202(a), 718.107. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The law of the United States Court of Appeals for the Tenth Circuit is applicable, as the miner was employed in the coal mining industry in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4; Transcript at 32.

challenges the administrative law judge's weighing and interpretation of the treatment records and medical opinions of record, contending that the administrative law judge erred in crediting the opinion of Dr. Rose over the contrary opinions of Drs. Farney and Repsher. Employer further alleges that the administrative law judge impermissibly gave determinative weight to the opinion of Dr. Rose based on her credentials, and maintains that the administrative law judge substituted her own medical opinion for that of the physicians. Employer's Brief at 6-18; 34-35; 39-40; 41-43. Employer's arguments lack merit.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the evidence sufficient to establish legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge accurately summarized the CT scan evidence, treatment records, and the conflicting medical opinions of record, and determined that only Dr. Rose diagnosed a respiratory impairment arising out of coal mine employment, while Drs. Farney and Repsher found no pneumoconiosis, and Dr. Gagon's opinion was silent on the issue. Decision and Order at 9-23; Claimant's Exhibits 1, 11, Employer's Exhibits 1, 9, 12, 24, 25, 26; Director's Exhibit 12. The administrative law judge determined that Drs. Farney and Repsher each diagnosed hypoxemia due to obesity, severe obstructive sleep apnea, and other non-respiratory conditions, and determined that, while claimant was disabled due to his age and a multitude of medical conditions, he did not have an intrinsic obstructive or restrictive pulmonary impairment. Employer's Exhibits 1, 12, 25, 26. The administrative law judge acted within her discretion in finding that Dr. Rose's diagnosis of chronic obstructive pulmonary disease/industrial bronchitis from coal dust exposure was credible in light of claimant's treatment records that referenced diagnoses of chronic bronchitis with a history of productive cough; the CT scan evidence; and the record as a whole. In light of all relevant evidence of record, the administrative law judge acted within her discretion in according determinative weight to the opinion of Dr. Rose, as she found that it was better reasoned and documented, and more persuasive than the opinions of Drs. Farney and Repsher. Decision and Order at 23-24; Claimant's Exhibits 1, 5, 11; Employer's Exhibits 19, 21, 22, 23, 24; *see Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge acknowledged that Drs. Farney, Repsher, and Rose were all Board-certified in internal and pulmonary medicine, but permissibly accorded Dr. Rose's opinion greater probative weight based, in part, on her superior qualifications in the areas of respiratory diseases in general, and coal dust induced lung diseases in particular.[4] Decision and Order at 24; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113

[4] The administrative law judge noted Dr. Rose's Board-certification in preventative/occupational medicine; the fact that she is highly involved in the area of

(1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We find no merit in employer's contention that the administrative law judge applied an incorrect standard for determining the presence of pneumoconiosis, or that she substituted her own medical opinion for that of the experts, as the administrative law judge could properly rely on Dr. Rose's diagnosis of a chronic lung disease arising out of coal mine employment to support her finding of legal pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §718.201; *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); Decision and Order at 24. As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding of legal pneumoconiosis at Section 718.202(a)(4).

Lastly, employer maintains that the administrative law judge erred in finding the opinion of Dr. Rose sufficient to establish disability causation at Section 718.204(c). We disagree. Based on her weighing of the conflicting medical opinions on the issue of legal pneumoconiosis, and her acknowledgment of Dr. Rose's measurement and interpretation of the levels of claimant's residual volume, air flow, FEV_1/FVC, FEF 50 and FEF 75,[5] as supported by claimant's qualifying blood gas studies and evidence of cor pulmonale with right-sided heart failure, the administrative law judge permissibly determined that the doctor's opinion, that claimant's chronic sleep apnea, organic heart disease and legal pneumoconiosis were all contributing causes of claimant's disabling hypoxemia, was well-reasoned, documented, and entitled to determinative weight on the issue of disability causation. Decision and Order at 30-33; *see Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989). The administrative law judge rationally discounted the opinions of Drs. Farney and Repsher, as they were based on a determination that the miner did not suffer from pneumoconiosis or any other respiratory impairment, contrary to the administrative law judge's findings. *See Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S.

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respiratory diseases and coal dust induced lung diseases; that she served as the medical director for the Miner's Clinic of Colorado for four years, diagnosing and treating over six hundred miners; that she currently is a faculty member at National Jewish Hospital, ranked the number one respiratory hospital in the United States by *US News and World Report*; and that she received a research grant and was the principal investigator for the Rocky Mountain Regional Black Lung Program in 2005 and 2006. Decision and Order at 24; Claimant's Exhibit 6.

[5] Dr. Rose opined that claimant has a component of airways obstruction on the basis of his elevated residual volume of 182 percent, the decline in his FEF 50 and 75, the increase in his airways resistance, and the decreased specific conductance. Employer's Exhibit 24 at 66.

1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). Consequently, we affirm the administrative law judge's finding that the weight of the evidence established disability causation at Section 718.204(c), as supported by substantial evidence, and we affirm her award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge