BRB No. 09-0470 BLA

DRANHAN H. RAMEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING AND PROCESSING COMPANY	)	DATE ISSUED: 02/24/2010
	)	
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Dranhan H. Ramey, Rockhouse, Kentucky, *pro se*.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (06-BLA-0027) of Administrative Law Judge Daniel F. Solomon 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). This case has a lengthy procedural history, and involves claimant's request for modification of the denial of a duplicate

claim filed on July 29, 1997.[1] In the last appeal, the Board affirmed the administrative law judge's findings that claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000);[2] that the weight of the x-ray evidence of record was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1); and that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). However, as the administrative law judge failed to adequately explain why he discounted Dr. Jarboe's opinion, and failed to take into account the differing credentials of Drs. Fannin and Jarboe when weighing their opinions, the Board vacated the administrative law judge's finding that the medical opinions of record were sufficient to establish the existence of legal pneumoconiosis[3] at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c), and remanded the case for further consideration thereunder. The Board instructed the administrative law judge on remand to reconsider the entirety of the opinions of Drs. Fannin and Jarboe, with reference to their reasoning and documentation, and the respective qualifications of the physicians. *D.R.* [*Ramey*] *v. Trojan Mining and Processing Co.*, BRB No. 07-0438 BLA (Feb. 29, 2008) (unpub.), slip op. at 3 n.5.

On remand, the administrative law judge found that the more probative medical opinion evidence established legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), and disability causation under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310 (2000), and awarded benefits.

In the present appeal, employer challenges the administrative law judge's findings of legal pneumoconiosis and disability causation under 20 C.F.R. §§718.202(a)(4), 718.204(c).[4] Claimant responds, urging affirmance of the award of benefits. The

[1] The full procedural history of this case is set forth in *D.R.* [*Ramey*] *v. Trojan Mining and Processing Co*., BRB No. 07-0438 BLA (Feb. 29, 2008)(unpub.).

[2] The former version of the regulations, found at 20 C.F.R. §§725.309 and 725.310 (2000), applies to this claim, because it was filed prior to January 19, 2001, the effective date of the revised regulations at 20 C.F.R. §§725.309, 725.310. *See* 20 C.F.R. §725.2(c).

[3] "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).

[4] While employer also challenges the administrative law judge's finding of clinical pneumoconiosis under 20 C.F.R §718.202(a)(1), the Board previously addressed and rejected employer's arguments, and affirmed the administrative law judge's findings thereunder. *Ramey*, BRB No. 07-0438, slip op. at 5; Decision and Order at 7. As employer has not set forth any valid exception to the law of the case doctrine, we adhere to our previous holding regarding this issue. *See Church v. Eastern Associated Coal*

Director, Office of Workers' Compensation Programs, has declined to participate in this 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.[5] 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).

Under Section 718.202(a)(4), employer challenges the administrative law judge's reliance on the medical opinion of Dr. Fannin to support a finding of legal pneumoconiosis, and argues that the administrative law judge should have credited Dr. Jarboe's contrary opinion. Employer submits that Dr. Jarboe "did not rely primarily on a negative x-ray" to conclude that the miner does not have pneumoconiosis, and maintains that the administrative law judge was obligated to accord determinative weight to the opinion of Dr. Jarboe as the better-credentialed physician. Employer's Brief at 8. Employer's arguments lack merit.

Contrary to employer's assertion, the administrative law judge, on remand, did not discount Dr. Jarboe's opinion on the ground that the physician relied primarily on a negative x-ray. Rather, the administrative law judge assessed Dr. Jarboe's interpretation of the miner's objective testing, as well as his corresponding testimony, which is a proper evaluative framework for weighing the reliability of medical evidence. *See generally Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Further, in re-evaluating the conflicting medical opinions, the administrative law judge acknowledged Dr. Jarboe's superior professional credentials, but was not required to credit his opinion on that basis alone. Decision and Order on Remand at 4, 6; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In considering the entirety of the medical opinion, in accordance with the Board's remand instructions, the administrative law judge found that Dr. Jarboe presented "assorted rationales" in opining that there was insufficient evidence to diagnose pneumoconiosis. Decision and Order on Remand at 6. Specifically, Dr. Jarboe indicated that claimant had pulmonary function changes that "would be compatible with a dust induced lung disease," but concluded that claimant's changes of significant restrictive impairment with air trapping had several more likely,

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Corp., 20 BLR 1-8 (1996); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202, 1-203 (1989)(*en banc*); Decision and Order at 1; Director's Exhibit 19 at 389.

non-coal dust related causes, *i.e.*, smoking, obesity, possible congestive heart failure, and the splitting of claimant's sternum during coronary artery bypass surgery. Employer's Exhibits 1, 2. Noting that the Department of Labor, in promulgating the amendments to the regulations, recognized that smokers who mine have an additive risk for developing significant obstruction, the administrative law judge determined that Dr. Jarboe did not address the elements of legal pneumoconiosis, as defined at 20 C.F.R. §718.201, or state whether the effects from smoking and coal dust exposure could be distinguished, and was not asked at deposition to differentiate between the restrictive and obstructive respiratory deficits demonstrated in the record. Decision and Order on Remand at 6; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see generally Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989)(medical expert's failure to address whether coal mine employment was an aggravating or contributing cause in miner's pulmonary impairment). By contrast, the administrative law judge determined that Dr. Fannin treated claimant for more than ten years, and issued a reasoned medical opinion diagnosing clinical and legal pneumoconiosis, based on physical findings, symptomotology, and the results of multiple objective tests. The administrative law judge therefore concluded that Dr. Jarboe's opinion, taken as a whole, was equivocal and entitled to less weight, *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-7, 19 BLR 2-111, 2-117 (6th Cir. 1995), while the opinion of Dr. Fannin was well-reasoned and sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Decision and Order at 5-6; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The assessment of the weight and credibility to be accorded to conflicting medical evidence is for the administrative law judge as fact-finder. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). In the present case, the administrative law judge identified deficiencies in the comprehensiveness and persuasive value of Dr. Jarboe's opinion, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see generally Jericol Mining Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002), and permissibly relied on the opinion of Dr. Fannin to support a finding of legal pneumoconiosis. As substantial evidence supports the administrative law judge's findings at Section 718.202(a)(4), they are affirmed.

Under Section 718.204(c), employer contends that the administrative law judge erred in finding that claimant established disability causation. Employer asserts that the administrative law judge failed to accord proper weight to Dr. Jarboe's opinion, that claimant's totally disabling respiratory impairment was not caused by pneumoconiosis, and failed to explain why he discounted the opinion. Employer's Brief at 11-14. Employer's arguments lack merit. Reconsidering the conflicting evidence under Section 718.204(c), the administrative law judge properly accorded little weight to Dr. Jarboe's opinion because the physician did not diagnose either clinical or legal pneumoconiosis, in direct contradiction to the administrative law judge's findings. Decision and Order on

Remand at 7; *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom. Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *see also Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge acted within his discretion in finding that claimant established disability causation at Section 718.204(c), based on the contrary opinion of Dr. Fannin, that both smoking and coal dust exposure were contributing causes of claimant's disability, and we affirm his findings thereunder, as supported by substantial evidence. *See Cornett*, 227 F.3d 569, 22 BLR 2-107; *Gross v. Dominion Coal Corp.*, 22 BLR 1-8 (2003). Consequently, we affirm the administrative law judge's findings that modification was appropriate pursuant to Section 725.310 (2000), and that claimant was entitled to benefits.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of 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