BRB No. 10-0264 BLA

JAMES A. ADAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/03/2011
	)	
A & E COAL COMPANY	)	
	)	
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 Subsequent Claim Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Maia S. Fisher (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Subsequent Claim Awarding Benefits (08-BLA-5863) of Administrative Law Judge Robert B. Rae rendered on a

claim[1] 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 administrative law judge credited claimant with seventeen years of coal mine employment, as stipulated by the parties.[2] The administrative law judge found that the medical evidence developed since the denial of claimant's previous claim established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby demonstrating a "material change in condition" pursuant to 20 C.F.R. §725.309.[3] Considering the claim on its merits, the administrative law judge found that the medical opinion evidence established that claimant has legal pneumoconiosis[4] in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the medical evidence

[1] Claimant's initial claim, filed on September 28, 1988, was denied by a district director on March 22, 1989, because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed his current claim on December 5, 2007. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4; Hearing Transcript at 11. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The former version of 20 C.F.R. §725.309(d), which applied to subsequent claims that were filed before January 19, 2001, required that a miner establish a "material change in conditions." 20 C.F.R. §725.309(d)(2000). This subsequent claim filed on December 5, 2007, is governed by the amended regulation at 20 C.F.R. §725.309, *see* 20 C.F.R. §725.2(c), under which claimant must establish "a change in one of the applicable conditions of entitlement" by demonstrating, with new evidence, that he "meets at least one of the criteria that he . . . did not meet previously." 20 C.F.R. §725.309(d)(2). On appeal, no party challenges the administrative law judge's reference to the language of the former regulation, nor does employer challenge the administrative law judge's finding that the new evidence establishes the total disability element that claimant did not establish previously. *See* n.6, *infra*.

[4] 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).

established that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and that he is totally disabled due to legal pneumoconiosis pursuant to Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief, but noted, in his letter to the Board, that if the award of benefits cannot be affirmed, the Board must remand this case to the administrative law judge for consideration pursuant to a recent amendment to the Act that was enacted by Section 1556 of Public Law No. 111-148.[5] Employer filed a reply brief, reiterating its contentions on appeal, and noting that, if the award cannot be affirmed, the case must be remanded to the administrative law judge for consideration pursuant to the recent amendment to the Act.[6]

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. 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).

Based upon the parties' responses, and our review, we hold that Section 1556 does not affect the disposition of this case. As will be discussed below, we affirm the administrative law judge's award of benefits. Thus, there is no need to consider whether claimant could establish entitlement with the aid of the presumption that was reinstated by Section 1556.

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[5] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings as to the length of claimant's coal mine employment, and that claimant established total disability pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a 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. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Legal Pneumoconiosis

Pursuant to Section 718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Rasmussen and Jarboe. Dr. Rasmussen opined that claimant's disabling COPD is due to both smoking and coal mine dust exposure. Director's Exhibits 13 at 26, 29; 16 at 1; Claimant's Exhibits 1 at 20-25; 2 at 2. Dr. Jarboe opined that claimant's COPD is due solely to smoking and asthma, and is unrelated to coal mine dust exposure. Employer's Exhibits 1 at 9; 4 at 3; 8 at 34, 36, 55, 65. After setting forth the medical opinions in detail, and considering the qualifications of the physicians, the administrative law judge found that Dr. Rasmussen's opinion was well-reasoned. By contrast, he found that Dr. Jarboe's opinion was not well-reasoned. Thus, the administrative law judge found that claimant established the existence of legal pneumoconiosis, based upon Dr. Rasmussen's opinion.

Dr. Rasmussen's Opinion

In his written reports dated January 21 and March 14, 2008, and March 16, 2009, Dr. Rasmussen attributed claimant's COPD to both smoking and coal mine dust exposure, acknowledging in his last report, that smoking is a "very significant factor," and that coal mine dust exposure is a "material co-contributor." Director's Exhibits 13 at 26, 29; 16 at 1; Claimant's Exhibit 2 at 2. In his deposition on February 23, 2009, Dr. Rasmussen testified that the primary cause of claimant's COPD was smoking, with the second factor being coal mine dust exposure. Claimant's Exhibit 1 at 20-25. Dr. Rasmussen could not distinguish between the two causes, or apportion the percentage of claimant's COPD due to coal mine dust exposure and that due to smoking. *Id*. at 46-47, 53-55. Dr. Rasmussen stated, on cross-examination, that claimant's COPD could all be due to either smoking or coal mine dust exposure. *Id*. at 53. However, Dr. Rasmussen concluded that claimant's smoking and coal mine dust exposure were additive in causing his COPD, opining that while it "could be all [caused by smoking or coal mine dust exposure], . . . , it's a combination of the two." *Id*. at 64-65.

The administrative law judge found that Dr. Rasmussen's opinion was well-documented and reasoned because Dr. Rasmussen "accounts for all of the medical evidence . . . and he does not irrationally rule out factors in his causation analysis. I also find Dr. Rasmussen's opinions to be well-documented because he has provided ample

medical authority in support of his opinions that is in harmony with the current regulations." Decision and Order at 21. Specifically, the administrative law judge found that Dr. Rasmussen's opinion was consistent with the Department of Labor's findings regarding the medical literature concerning coal mine dust and obstructive lung disease, in the preamble to the regulations. Decision and Order at 21, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000)("Coal dust exposure is additive with smoking in causing clinically significant airways obstruction and chronic bronchitis."); 65 Fed. Reg. 79,943 (Dec. 20, 2000)(medical literature "supports the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms").

Employer argues that the administrative law judge erred in relying on Dr. Rasmussen's opinion because it is insufficient, as a matter of law, to establish the existence of legal pneumoconiosis. Employer further asserts that the administrative law judge did not provide a valid rationale for his finding that Dr. Rasmussen's opinion is well-reasoned. Additionally, employer contends that the administrative law judge's finding that Dr. Rasmussen's opinion is consistent with the premises underlying the regulations is not a proper rationale for crediting the opinion. We disagree.

Contrary to employer's contention, Dr. Rasmussen's opinion is legally sufficient to establish the existence of legal pneumoconiosis, because it identifies coal mine dust exposure as contributing, "at least in part," to claimant's COPD. 20 C.F.R. §718.201(a)(2),(b); *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Thus, employer's argument that Dr. Rasmussen's opinion is legally insufficient to establish the existence of legal pneumoconiosis is rejected.

Employer's challenge to the administrative law judge's finding that Dr. Rasmussen's opinion is well-reasoned lacks merit, as the determination of whether a medical opinion is sufficiently reasoned is a credibility determination for the administrative law judge to make. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-103 (6th Cir. 1983). Here, substantial evidence supports the administrative law judge's permissible determination that Dr. Rasmussen adequately explained the bases for his diagnosis of legal pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Consequently, we reject employer's contention that the administrative law judge erred in finding Dr. Rasmussen's opinion to be well-reasoned.

Dr. Jarboe's Opinion

In his May 30 and September 1, 2008 reports, and in his February 25, 2009 deposition, Dr. Jarboe opined that claimant's COPD was not due to coal mine dust exposure because there was no evidence of pneumoconiosis on x-ray. Employer's

Exhibits 1 at 8, 4 at 4, 8 at 31. However, Dr. Jarboe conceded that coal mine dust exposure could produce a totally disabling respiratory impairment without x-ray evidence positive for pneumoconiosis. Employer's Exhibit 8 at 38. Dr. Jarboe also based his opinion that claimant's COPD is due to smoking on the lack of a "parallel" reduction in claimant's FEV1 and FVC values, marked hyperinflation, and the reversibility seen on claimant's pulmonary function study, because these findings are inconsistent with COPD due to coal mine dust exposure. *Id*. at 65.

The administrative law judge found that Dr. Jarboe's opinion was not well-reasoned because the physician required x-ray evidence of nodules as proof that there was sufficient coal dust retention to cause COPD, and because the physician's other reasons for rejecting coal mine dust exposure as a cause of claimant's COPD were based on medical studies that were rejected by the Department of Labor in its preamble to the regulations.

Employer argues that the administrative law judge erred in discounting Dr. Jarboe's opinion based on an erroneous belief that Dr. Jarboe excluded coal mine dust exposure as a cause of claimant's COPD because claimant did not have radiographic evidence that was positive for pneumoconiosis. Employer contends that Dr. Jarboe based his opinion, that claimant does not have legal pneumoconiosis, on other reasons, and acknowledged that COPD due to coal mine dust exposure can occur in the absence of x-ray findings that are positive for pneumoconiosis. Thus, employer argues, the administrative law judge erred in finding that Dr. Jarboe's opinion was contrary to the premises underlying the regulations. In this regard, employer asserts that the administrative law judge erred in weighing Dr. Jarboe's opinion against the preamble to the regulations, as the preamble is not a part of the record. We disagree.

The administrative law judge permissibly discounted Dr. Jarboe's opinion, that coal dust deposition could not be a cause of claimant's COPD because his x-rays did not reflect any nodules due to coal dust, as it was contrary to the premises underlying the regulations. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000)(stating that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is present."); *see also* 65 Fed. Reg. 79,939 (Dec. 20, 2000)(indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]"); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. Nov. 29, 2007)(unpub.); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); Decision and Order at 21-22.

The administrative law judge considered the other reasons that Dr. Jarboe excluded coal mine dust exposure as a cause of claimant's COPD, but rationally rejected them, because Dr. Jarboe's position, based on medical studies supporting "the proposition that coal miners have very minimal elevations of reduced volume" has "specifically been discredited in the regulations," Decision and Order at 22, *citing* 65 Fed. Reg. 79,938-39 (Dec. 20, 2000)(stating that "although the loss of lung function . . . is greater in smokers, the two effects [are] additive"); *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. Contrary to employer's assertions, the administrative law judge did not treat the preamble as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis; he permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

Employer also argues that the administrative law judge substituted his opinion for that of a medical expert by finding that Dr. Jarboe's opinion, that claimant's impairment is due solely to smoking, was not well supported. We disagree. The administrative law judge accurately noted Dr. Jarboe's testimony that the average decline in FEV1 from smoking a pack of cigarettes per day is five milliliters per year, and that claimant's loss of 2,710 milliliters of his FEV1 capacity, over time, was much greater than would be expected for his age if the loss were due to his smoking alone. Employer's Exhibit 8 at 51. Further, he accurately noted Dr. Jarboe's testimony that the discrepancy was explained by the fact that, after the age of forty, the rate of loss of one's FEV1 due to smoking increases to thirty to sixty milliliters per year. Contrary to employer's argument that the administrative law judge improperly questioned Dr. Jarboe's calculations, the administrative law judge simply applied Dr. Jarboe's own calculations and permissibly found that, even using Dr. Jarboe's figure of sixty milliliters of FEV1 loss per year, claimant, who was then fifty-nine, would have had to have smoked a pack per day for forty-five years after he turned forty in order for smoking alone to have caused the loss of FEV1 that claimant now suffers. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 22-23; Employer's Exhibit 8 at 49-51.

Lastly, employer argues that the administrative law judge erred in discounting Dr. Jarboe's opinion by assuming that pneumoconiosis is a latent and progressive disease. Employer's argument lacks merit, as the administrative law judge did not discredit Dr. Jarboe's opinion on that basis. The administrative law judge merely observed that his finding of legal pneumoconiosis was corroborated by the progressive worsening of claimant's impairment since his prior claim, consistent with the fact that pneumoconiosis may be progressive. Decision and Order at 23; *see* 20 C.F.R. §718.201(c). For the foregoing reasons, we reject employer's contentions, and we affirm the administrative

law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7]

Total Disability Due to Legal Pneumoconiosis

In finding that the evidence established that the miner's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c),[8] the administrative law judge credited Dr. Rasmussen's opinion, and discredited Dr. Jarboe's opinion, for the same reasons that he set forth in his consideration of whether the medical opinion evidence supported a finding of legal pneumoconiosis. Because the administrative law judge discredited Dr. Jarboe's opinion when determining the existence of legal pneumoconiosis, the administrative law judge did "not give Dr. Jarboe's opinion that [c]laimant's disability was not substantially caused by coal dust much weight . . . ." Decision and Order at 24. Employer raises the same challenges to the administrative law judge's disability causation finding that it raised with respect to his finding of legal pneumoconiosis. Because we have rejected those arguments, and since the administrative law judge permissibly discounted the disability causation opinion of Dr. Jarboe on the ground that the physician did not diagnose claimant with legal pneumoconiosis, we affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to

[7] We reject employer's argument that the administrative law judge applied an unequal standard in evaluating the opinions of Drs. Rasmussen and Jarboe. In both cases, the administrative law judge inquired as to whether the opinions were well-documented and reasoned.

[8] 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).

Section 718.204(c). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 825-26, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 24.

Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a), and total disability due to legal pneumoconiosis pursuant to Section 718.204(c), we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order On Subsequent Claim 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