BRB No. 11-0369 BLA

ELVIE L. DECKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEBSTER COUNTY COAL CORPORATION	)	DATE ISSUED: 02/27/2012
	)	
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.

Brent Yonts, Greenville, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

Employer appeals the Decision and Order on Remand Award of Benefits (2007-BLA-05057) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on February 17, 2004,[1] pursuant to 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

[1] The procedural history of the prior claims is set forth in the Board's prior decision and is incorporated herein. *Decker v. Webster County Coal Corp.*, BRB No. 09-0491 BLA, slip op. at 3 n.1 (June 14, 2010) (Hall, J., dissenting) (unpub.).

codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for a second time. In a Decision and Order dated March 12, 2009, the administrative law judge credited claimant with at least twenty-eight years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Reviewing the claim on the merits, the administrative law judge found that the evidence was insufficient to establish the existence of clinical pneumoconiosis.[3] However, he also found that claimant established the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b).[5] *Decker v. Webster County Coal Corp.*, BRB No. 09-0491 BLA, slip op. at 3 n.4 (June 14, 2010) (Hall, J., dissenting) (unpub.). The Board also rejected employer's argument that the

[2] The 2010 amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, do not apply to this claim, as it was filed before January 1, 2005.

[3] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id*.

[4] Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[5] Based on the administrative law judge's unchallenged determination that claimant established total disability, an element of entitlement that defeated his prior claim, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and, therefore, was entitled to a merits review of his claim, based on all of the record evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004).

administrative law judge improperly applied "principles" from the preamble to the 2001 revised regulations to evaluate the evidence on the issues of legal pneumoconiosis and disability causation. *Id*. at 3. However, the Board agreed with employer that the administrative law judge substituted his opinion for that of the medical experts in concluding that any correlation between the progression of claimant's respiratory disability and his obesity over time was "coincidental." The Board remanded the case for the administrative law judge to address the factors cited by Drs. Repsher, Rosenberg and Jarboe for excluding coal dust exposure as a causative factor for claimant's disabling respiratory condition, which included the physiological effects of morbid obesity on claimant's respiratory condition, an "analysis of the residual volume percentage" and "the correlation between claimant's FEV1 and MVV values that demonstrated a statistical unlikelihood that coal dust exposure aggravated claimant's [chronic obstructive pulmonary disease (COPD)]." *Id*. at 8 (internal citations omitted). Thus, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(a)(4), 718.204(c) and remanded the case for further consideration. *Id*. at 8-9.

On remand, in a Decision and Order issued on January 24, 2011, the administrative law judge reiterated that all of the physicians in this case agree that claimant suffers from disabling COPD. The administrative law judge gave greatest weight to the opinion of Dr. Rasmussen, that claimant's disabling COPD is significantly related to coal dust exposure, over the contrary opinions of Drs. Repsher, Rosenberg and Jarboe, that claimant's respiratory condition is due to smoking and obesity but not coal dust exposure. The administrative law judge also noted that, in attributing claimant's restrictive impairment to obesity, employer's experts did not adequately explain why coal dust exposure was not a causative factor for claimant's disabling obstructive respiratory impairment. The administrative law judge specifically rejected the rationales provided by employer's experts for distinguishing between impairment caused by smoking and coal dust exposure, based on an examination of the FEV1 or FEV1/FVC percentage. Relying on Dr. Rasmussen's opinion, the administrative law judge found that claimant satisfied his burden to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis at 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 evaluating the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer specifically asserts that the administrative law judge erred in failing to identify the "legislative facts" he relied upon to discredit or credit the medical experts. Employer maintains that the administrative law judge applied an incorrect and inconsistent legal standard in weighing the conflicting evidence, and did not properly explain the bases for

his credibility determinations, as required by the Administrative Procedure Act (APA).[6] Claimant responds, urging an affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[7] 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer's primary argument in this appeal is that the administrative law judge's credibility determinations are insufficiently explained and do not withstand scrutiny under the APA. We disagree. In accordance with the Board's instructions, the administrative law judge reweighed the medical opinions of Drs. Repsher, Rosenberg, Jarboe, Rasmussen, Chavda, and Simpao, relevant to the issues of legal pneumoconiosis and disability causation.[8] The administrative law judge noted that, in excluding coal dust exposure as a significant contributing cause of claimant's disabling COPD, Drs. Repsher and Rosenberg cited to the fact that there was a *disproportionate* decrease in FEV1 compared to the FVC. Decision and Order on Remand at 8. The administrative law judge, however, stated that he was "not convinced" that the FEV1/FVC percentage

[6] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[8] We incorporate the summaries of the physicians' opinions set forth in *Decker*, BRB No. 09-0491 BLA, slip op. at 5-6 nn.11-14.

"demonstrate[d] a statistical 'unlikelihood' that coal dust exposure aggravated claimant's COPD[,]" since he was "not given statistics to review" and, therefore, was not presented with "valid, authoritative medical literature . . . that substantiates" the analyses of employer's experts. Decision and Order on Remand at 8; *see also* March 12, 2009 Decision and Order at 30 n.13. The administrative law judge further noted that, while Drs. Repsher, Rosenberg and Jarboe attributed claimant's respiratory disability to morbid obesity and smoking, they did not specifically explain whether obesity would be responsible for claimant's disabling obstruction. Decision and Order on Remand at 8. In contrast, the administrative law judge noted that Drs. Rasmussen and Chavda specifically opined that, while obesity can cause restriction, it does not cause obstruction. *Id*. at 7-8. Additionally, the administrative law judge found the opinions of employer's experts to be weakened by the fact that they relied on medical literature that pre-dated the 2001 revised regulations and that was related to clinical, but not legal, pneumoconiosis. *Id*. at 8. Because the administrative law judge has provided valid reasons for rejecting the opinions of Drs. Repsher, Rosenberg and Jarboe, we reject employer's assertion that the administrative law judge's findings do not satisfy the APA. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kozele v. Rochester & Pittsburg Coal Co*., 6 BLR 1-378 (1983).

We also reject employer's argument that the administrative law judge erred in crediting Dr. Rasmussen's opinion. The administrative law judge had discretion to rely on Dr. Rasmussen's explanation that, because smoking and coal dust exposure cause the same type of obstructive respiratory impairment, it is impossible to distinguish between the effects of either of these factors on claimant's COPD. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002), *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order on Remand at 4. The administrative law judge permissibly concluded that, based on Dr. Rasmussen's review of the medical record and objective testing, he provided a reasoned and documented opinion that "[claimant's] coal mine dust exposure [was] a significant contributing cause of his disabling lung disease." Decision and Order on Remand at 4.

Moreover, contrary to employer's argument, the administrative law judge reasonably found that Dr. Rasmussen's opinion is "more consistent [with] the legislative facts that establish that smoking and mining can be additive."[9] Decision and Order on

[9] Although employer asserts that the administrative law judge did not identify the "legislative facts" he relied on in weighing the evidence, the administrative law judge specifically noted that the Department of Labor "rendered certain legislative facts and determined that smokers who mine have additive risk for developing significant

Remand at 8; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Claimant's Exhibit 12. The administrative law judge also permissibly relied upon Dr. Rasmussen's opinion because he found that Dr. Rasmussen is "an acknowledged expert in the field of pulmonary impairments of coal miners" and that his "*curriculum vitae* establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis" and that, in comparison to the other physicians of record, Dr. Rasmussen has performed the most recent research with regard to the effects of black lung. Decision and Order at 4, 8 (citations omitted); *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

We consider employer's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge rationally explained, in accordance with the APA, why he accorded dispositive weight to the opinion of Dr. Rasmussen,[10] over the contrary opinions of Drs. Repsher, Rosenberg and Jarboe, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001). We also affirm the administrative law judge's reliance on Dr. Rasmussen's opinion to find that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal*

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obstruction." Decision and Order on Remand at 2, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); Employer's Brief in Support of Petition for Review at 27-29.

[10] Dr. Rasmussen's opinion is corroborated by the opinion of Dr. Chavda, who agreed that claimant is totally disabled by a chronic obstructive lung disease significantly related to coal dust exposure. Although the administrative law judge did not specifically address the weight he accorded Dr. Chavda's opinion, he indicated that Dr. Chavda's opinion was reasoned and that he withstood "close questioning" by employer on cross-examination. Decision and Order on Remand at 7. Moreover, Dr. Simpao opined that he could not distinguish between the effects of obesity, smoking and coal dust exposure on claimant's respiratory impairment, but explained that smoking and coal dust exposure have a synergistic effect. Director's Exhibit 13; Claimant's Exhibit 6. The administrative law judge rejected employer's argument that this opinion falls short of a diagnosis of legal pneumoconiosis and accepted Dr. Simpao's assertion that smoking and coal dust exposure are not distinguishable in this case. As with Dr. Chavda, the administrative law judge did not indicate what weight he was assigning Dr. Simpao's opinion.

Co. v. Smith, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). We, therefore, affirm, as supported by substantial evidence, the administrative law judge's award of 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