BRB No. 13-0369 BLA

GERALD CROW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIGO COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 02/26/2014
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Shelly Rigsby Stuthers, Terre Haute, Indiana, for claimant.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5794) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed on

December 15, 2008 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1]

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge found that claimant established that he had thirty years of coal mine employment in surface mining,[3] but did not establish that any of his coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge, therefore, found that claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

The administrative law judge also considered whether claimant could establish entitlement to benefits, without the assistance of the Section 411(c)(4) presumption. The administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[4] The administrative law judge also found that the evidence established that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

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[1] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the 2010 amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Unless otherwise indicated, the relevant version of all regulations cited in this decision may be found in 20 C.F.R. Parts 718, 725 (2013).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

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

[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).

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. [5]

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).

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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In evaluating whether claimant established the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Murthy, Houser, Pfeiffer, and Repsher. Dr. Murthy diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/chronic bronchitis, due to both coal mine dust exposure and smoking. Director's Exhibit 11. Dr. Houser also diagnosed legal pneumoconiosis in the form of emphysema, due to both coal mine dust exposure and smoking. Claimant's Exhibit 4. Conversely, Drs. Pfeiffer and Repsher opined that claimant does not suffer from legal pneumoconiosis. Although Dr. Pfeiffer diagnosed obstructive lung disease, and Dr. Repsher diagnosed COPD/emphysema, they opined that these diseases were due entirely to cigarette smoking. Employer's Exhibits 2, 3.

The administrative law judge credited Dr. Houser's diagnosis of legal pneumoconiosis, finding that the doctor's opinion that claimant's emphysema was due to

[5] Employer does not challenge the administrative law judge's finding of thirty years of coal mine employment, or her finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Those findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

both coal mine dust exposure and smoking was well-reasoned, and "consistent with the premises underlying the current regulations." Decision and Order at 28. The administrative law judge also noted that Dr. Houser was claimant's treating physician and was familiar with claimant's medical records. *Id.* The administrative law judge further noted that Dr. Houser's diagnosis of legal pneumoconiosis was supported by that of Dr. Murthy. *Id.* at 30. The administrative law judge accorded less weight to Dr. Pfeiffer's opinion because she found that the doctor based his opinion on an assumption contrary to the regulations, namely, that coal mine dust exposure does not cause obstructive lung disease in the absence of clinical pneumoconiosis. *Id.* at 28. The administrative law judge accorded less weight to Dr. Repsher's opinion because she found that his views were contrary to medical science credited by the Department of Labor. Decision and Order at 29. The administrative law judge also accorded less weight to the opinions of Drs. Pfeiffer and Repsher because she found that neither physician "adequately explained why [thirty] years of coal dust exposure was not a factor in [claimant's] obstructive disease." *Id.* at 30. The administrative law judge, therefore, determined that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Employer contends that the administrative law judge committed numerous errors in finding that Dr. Houser's opinion established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer initially argues that the administrative law judge erred by not considering Dr. Houser's reliance upon an inaccurate coal mine employment history. The administrative law judge found that claimant established that he had thirty years of coal mine employment in surface mining. Decision and Order at 3, 22. Employer accurately notes that the administrative law judge subsequently determined that claimant, for purposes of invoking the Section 411(c)(4) presumption, failed to establish that his surface coal mining was performed in conditions substantially similar to those in underground mines. However, this determination does not call into question the administrative law judge's finding that claimant worked for thirty years in surface coal mining. Because Dr. Houser reported that claimant worked as a surface coal miner for approximately thirty years, Claimant's Exhibit 4, we reject employer's contention that the doctor relied upon an inaccurate coal mine employment history.

Employer next argues that Dr. Houser's diagnosis does not support a finding of legal pneumoconiosis, because the doctor did not state that claimant's pulmonary impairment was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). We disagree. Dr. Houser's opinion, that claimant's emphysema is due to both coal mine dust exposure and smoking, is sufficient to establish legal pneumoconiosis, as it establishes that claimant's emphysema was due, in part, to coal mine dust exposure. *See Freeman United Coal Mining Co. v. Director, OWCP* [*Shelton*], 957 F.2d 302, 303, 16 BLR 2-40, 2-42 (7th Cir. 1992); Claimant's Exhibit 4.

Employer next contends that the administrative law judge erred in relying upon Dr. Houser's opinion to establish the existence of legal pneumoconiosis, because the physician did not provide adequate reasoning to support his diagnosis. In attributing claimant's emphysema to his coal mine dust exposure and cigarette smoking, Dr. Houser explained that he based his opinion on a review of claimant's medical records, the objective test results, the medical literature, and his experience as a pulmonologist. Claimant's Exhibit 4. Dr. Houser stated that claimant's pulmonary function studies showed "moderately severe airway obstruction without significant bronchodilator response," and that the x-ray and CT scan evidence showed emphysema. *Id.* Dr. Houser cited medical literature that coal dust exposure "causes centrilobular emphysema (similar to that caused by cigarette smoking)." *Id.* Dr. Houser further noted that the medical literature showed that coal mine dust exposure and smoking act similarly on pulmonary function, causing "a general shift of the FEV1 distribution to lower levels." *Id.* Based upon claimant's thirty year employment as a surface miner and thirty-pack year smoking history,[6] Dr. Houser opined that claimant's emphysema was due to both coal mine dust exposure and smoking. *Id.*

The "decision of whether a medical opinion is reasoned is a decision that rests ultimately with the [administrative law judge]." *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge found that Dr. Houser's diagnosis of legal pneumoconiosis, in the form of emphysema due to both coal mine dust exposure and cigarette smoking, was well-reasoned, because it was supported by the medical evidence and the premises underlying the regulations.[7] Decision and Order at 30. We affirm the administrative law judge's determination that Dr. Houser's diagnosis of legal pneumoconiosis was well-reasoned, and sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[8] *Stein*, 294 F.3d at 895, 22 BLR at 2-426.

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[6] The administrative law judge credited claimant with a smoking history of thirty to thirty-five pack years, which ended by 1993. Decision and Order at 5.

[7] The administrative law judge noted that the Department of Labor has concluded that coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms. Decision and Order at 27, *citing* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000).

[8] Contrary to employer's contention, there is no evidence that the administrative law judge credited Dr. Houser's opinion merely because he was claimant's treating physician.

Employer also contends that the administrative law judge erred in her consideration of Dr. Murthy's opinion. Employer specifically contends that the administrative law judge erred by not considering Dr. Murthy's reliance upon an "inflated coal mine history." Employer's Brief at 12. We disagree. Employer acknowledges that Dr. Murthy relied upon a coal mine employment history of less than twenty-two years, which is less than the coal mine employment history of thirty years credited by the administrative law judge. Because Dr. Murthy attributed claimant's COPD to coal mine dust exposure based upon a history of only twenty-two years of coal mine dust exposure, employer fails to explain how the doctor's reliance upon an even greater duration of coal mine dust exposure would undermine his opinion that coal mine dust exposure contributed to claimant's obstructive impairment.[9]

Employer also contends that the administrative law judge erred in finding that Dr. Murthy's opinion was well-reasoned. Although the administrative law judge found that Dr. Murthy's diagnosis of legal pneumoconiosis was reasoned, she found that it was "not as well documented or reasoned as Dr. Houser's opinion."[10] Decision and Order at 28. Consequently, the administrative law judge credited Dr. Murthy's opinion as supportive of that of Dr. Houser.[11] Decision and Order at 30. We, therefore, find no error in the administrative law judge's consideration of Dr. Murthy's opinion.

Because employer does not challenge the administrative law judge's reasons for discrediting the opinions of Drs. Pfeiffer and Repsher, that claimant does not suffer from legal pneumoconiosis, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, because it is based upon substantial evidence, we

[9] Employer also notes that Dr. Murthy relied upon an inaccurate smoking history of twenty-one pack years. The administrative law judge, however, acted within her discretion in finding that the lesser smoking history relied upon by Dr. Murthy was "not so great as to render his opinion wholly unreliable, as it was still a significant history of smoking." Decision and Order at 28; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

[10] The administrative law judge found that Dr. Murthy did not adequately explain "why he attributed so little of [claimant's] obstruction to smoking." Decision and Order at 28.

[11] We similarly find no error in the administrative law judge's consideration of claimant's treatment records, as the administrative law judge merely found that this evidence generally supported Dr. Houser's diagnosis of legal pneumoconiosis. Decision and Order at 30.

affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted the opinions of Drs. Pfeiffer and Repsher because they did not diagnose legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 33. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Houser to find that claimant established the existence of legal pneumoconiosis, she permissibly found that Dr. Houser's opinion supported a finding that claimant is totally disabled due to legal pneumoconiosis. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). We, therefore, affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding 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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REGINA C. McGRANERY
Administrative Appeals Judge