BRB No. 07-0376 BLA

E.V.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MCDOWELL MINING, INCORPORATED	)	DATE ISSUED: 01/31/2008
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Waseem A. Karim (Jackson Kelly P.L.L.C.), Lexington, Kentucky, for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Deputy 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: 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-5642) of Administrative Law Judge Thomas M. Burke, 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). The administrative law judge credited claimant with twelve years and four months of qualifying coal mine employment, and determined that claimant's second claim, filed on July 13, 1999, was still pending and had merged with the instant claim, filed on November 24, 2003, because the district director had failed to forward the case for hearing upon claimant's request.[1] The administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis, and thus claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309 (1999).[2] Considering all of the evidence of record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the medical opinions of Drs. Hippensteel, Castle and Rasumussen on the issue of disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has submitted a limited response, arguing that employer has misstated the law relevant to the administrative law judge's discounting of Dr. Hippensteel's opinion for failure to diagnose pneumoconiosis, and urges the Board to reject employer's interpretation of the decisions of the United States Court of Appeals for the Fourth Circuit in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), and *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).[3]

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[1] Claimant's original claim for benefits was filed on February 12, 1997, and was denied on May 29, 1998 by Administrative Law Judge Daniel A. Sarno, Jr., for failure to establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] The amendments to the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, became effective on January 19, 2001. All citations to the regulations, unless otherwise noted, refer to the amended regulations. However, the amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, that were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 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. 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 finding that the weight of the evidence was sufficient to establish disability causation at Section 718.204(c). Specifically, employer contends that the administrative law judge erred in discrediting the opinion of Dr. Hippensteel based on the physician's failure to diagnose pneumoconiosis; in finding that the opinions of Drs. Hippensteel and Castle were not well reasoned; and in according Dr. Rasmussen's opinion greater weight based on his credentials. Employer's arguments are without merit.

In evaluating the evidence at Section 718.204(c), the administrative law judge accurately set forth the conflicting medical opinions of record, *see* Decision and Order at 11-15, and determined that Dr. Hippensteel based his conclusion, that claimant's disabling obstructive impairment was caused by smoking and asthma, primarily upon pulmonary function test results that were "not typical or suggestive of coal workers' pneumoconiosis," Employer's Exhibit 2 at 17, but rather, reflected reversibility after bronchodilation.[4] Decision and Order at 22; Employer's Exhibit 2 at 15, 17-18. Because

[4] Dr. Hippensteel examined claimant on February 28, 2006, and found no evidence of coal workers' pneumoconiosis. Dr. Hippensteel found that claimant's electrocardiogram was essentially normal at rest, and that claimant's spirometry tests showed severe airflow obstruction with some worsening post bronchodilator and air trapping. He also found that claimant's blood gas study results showed mild hypoxemia at rest and a significantly elevated carboxyhemoglobin level, consistent with claimant's smoking history. Employer's Exhibit 1. Dr. Hippensteel concluded that "the evidence altogether in this case shows with a reasonable degree of medical certainty that this man's pulmonary impairment is secondary to his long and continued cigarette smoking, which has been complicated by chronic bronchitis with associated ventilation perfusion mismatching and obstructive airflow impairment." Employer's Exhibit 1 at 3. Dr. Hippensteel subsequently reviewed Dr. Rasmussen's two reports and Dr. Castle's report, and testified at his deposition that "the findings by x-rays suggest the possibility that [claimant] does have simple pneumoconiosis." Employer's Exhibit 2 at 16. Dr. Hippensteel diagnosed an obstructive impairment without a restrictive component that was totally disabling, and concluded that the reversibility shown in the pulmonary function tests of Drs. Rasmussen and Castle after bronchodilation was compatible with smoking and asthma but not pneumoconiosis. Employer's Exhibit 2 at 15, 17-18.

Dr. Hippensteel did not clarify why the pulmonary function results were not "typical or suggestive" of pneumoconiosis, however, the administrative law judge acted within his discretion in finding that the opinion was insufficiently explained. Decision and Order at 22; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge further noted that Dr. Hippensteel's own pulmonary function tests did not show reversibility, and that where reversibility was demonstrated on other testing in the record, it was interpreted as only partial. *Id*. As the administrative law judge found that partial reversibility "does not exclude an underlying chronic condition such as pneumoconiosis," and as Dr. Hippensteel ruled out pneumoconiosis as a contributing cause of disability without explaining why pneumoconiosis could not coexist with smoking and asthma as causative factors, the administrative law judge permissibly concluded that Dr. Hippensteel's opinion was not well reasoned and thus was entitled to little weight.[5] Decision and Order at 22; *see Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Similarly, the administrative law judge determined that Dr. Castle's opinion, that claimant's disabling obstructive pulmonary impairment was caused by smoking-induced emphysema with an asthmatic component, was based largely on the impairment's lack of a restrictive component and on its reversibility.[6] Decision and Order at 12-13, 23;

[5] We need not reach employer's argument that the administrative law judge erroneously discredited Dr. Hippensteel's opinion on the alternate ground that the physician did not diagnose pneumoconiosis. As the administrative law judge provided at least one valid reason for according little weight to Dr. Hippensteel's opinion, error, if any, in the administrative law judge's application of the holding in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), would be harmless and would not affect the disposition of this case. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[6] The administrative law judge determined that Dr. Castle examined claimant on August 11, 2004, and diagnosed pneumoconiosis by x-ray. Dr. Castle reported that claimant's pulmonary function study results showed evidence of moderate airway obstruction with a very significant degree of reversibility after bronchodilation associated with gas trapping and a reduction in the diffusing capacity, and noted that when pneumoconiosis causes impairment, it generally does so by causing a mixed, irreversible obstructive and restrictive ventilatory defect. Dr. Castle stated that pneumoconiosis does not generally cause a reduction in the diffusing capacity, and concluded that the findings in this case were indicative of smoking-induced pulmonary emphysema with an asthmatic component; that it was possible to distinguish between pulmonary disability caused by coal dust exposure and that caused by tobacco abuse with a reasonable degree

Director's Exhibit 14; Employer's Exhibit 3. The administrative law judge noted, however, that the regulations contemplate that a miner may establish entitlement based on any totally disabling chronic restrictive or obstructive respiratory or pulmonary disease arising out of coal mine employment, and do not require a restrictive component. Decision and Order at 23; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.204. The administrative law judge further determined that the pulmonary function studies of record showed that claimant had a residual impairment even after the administration of bronchodilators, and that the partial reversibility attributed by Dr. Castle to asthma and by Dr. Rasmussen to hyperactive airways disease did not eliminate pneumoconiosis as an additional cause of impairment. Decision and Order at 23; Claimant's Exhibit 1; Employer's Exhibit 3. As Dr. Castle did not indicate the effect that coal dust exposure had on claimant's obstructive impairment, or explain how he ruled out claimant's pneumoconiosis completely as an independent contributing cause of disability, the administrative law judge permissibly concluded that none of the reasons Dr. Castle gave for finding that claimant's disability was unrelated to pneumoconiosis was persuasive. Decision and Order at 23; *see Clark*, 12 BLR at 1-155; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. The administrative law judge then acted within his discretion in finding that the contrary opinion of Dr. Rasmussen, that both smoking and coal dust exposure were independent and additive causes of claimant's disability, was entitled to greater weight because it was better reasoned and supported by the physician's review of the medical literature that documented his conclusions.[7] Decision and Order at 23; *see generally Compton v. Island Creek Coal Co.*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). While the

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of medical certainty; and that there were sufficient facts in this case to make such a distinction. Decision and Order at 12-13; Director's Exhibit 14. Dr. Castle was later deposed on April 7, 2006, and his testimony was consistent with his report. Employer's Exhibit 3.

[7] Dr. Rasmussen examined claimant twice and issued reports dated March 18, 2004 and April 5, 2005. Director's Exhibit 12; Claimant's Exhibit 1. Dr. Rasmussen diagnosed pneumoconiosis and stated that both smoking and coal dust exposure were risk factors for claimant's totally disabling obstructive impairment, and that claimant also exhibited evidence of hyperactive airways disease, making him more susceptible to the effects of coal dust exposure and explaining the partial reversibility of claimant's pulmonary function studies. After a review of claimant's test results and medical literature reporting that both smoking and coal dust exposure can contribute to the type of pulmonary pattern claimant exhibited, Dr. Rasmussen concluded that claimant's pneumoconiosis contributed significantly to his disabling chronic lung disease. Decision and Order at 11, 13-14; Claimant's Exhibit 1.

administrative law judge acknowledged that, unlike Drs. Castle and Hippensteel, Dr. Rasmussen was not Board-certified in pulmonary disease, the administrative law judge rationally accorded enhanced weight to Dr. Rasmussen's opinion on the additional basis of his expertise in the field of coal dust related diseases.[8] Decision and Order at 24; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178 (1994), and to assess the evidence of record and draw his own conclusions and inferences therefrom. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). As substantial evidence supports the administrative law judge's weighing of the medical opinions, we affirm his finding that claimant established disability causation at Section 718.204(c) and his award of benefits.

[8] The administrative law judge recognized Dr. Rasmussen's "long-term and highly specialized experience in the area of coal workers' pneumoconiosis," noting that the physician "has worked extensively in the area of black lung disease since 1969….he was presented with the American Public Health Association Presidential Award for 'exceptional service in the fight against [pneumoconiosis]'…[and] is 'an acknowledged expert in the field of pulmonary impairments of coal miners.'" Decision and Order at 24, citing 1972 U.S. Code Cong. Adm. News 2305, 2314.

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