BRB No. 09-0342 BLA

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| ROY GRIGSBY | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 01/27/2010 |
| LEECO, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| JAMES RIVER COAL COMPANY | ) | |
| | ) | |
| 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–Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Todd P. Kennedy (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order–Award of Benefits (07-BLA-5667) of Administrative Law Judge Larry S. Merck 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).[1] Claimant filed his current claim on June 29, 2006. Director's Exhibit 3. The administrative law judge credited claimant with twenty-six years of coal mine employment,[2] based on the parties' stipulation. The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White v. New White Coal Co*, 23 BLR 1-1, 1-3 (2004). In considering the claim on the merits, based on all the evidence, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), and that the medical opinion evidence established the existence of legal pneumoconiosis,[3] pursuant to 20 C.F.R. §718.202(a)(4), in the form of chronic obstructive pulmonary disease due to both smoking and coal mine dust exposure. The administrative law judge further determined that employer did not rebut the presumption of 20 C.F.R. §718.203(b), that claimant's clinical pneumoconiosis arose out of coal mine employment. Additionally, the administrative law judge found that claimant is totally disabled by a respiratory impairment that is 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 his analysis of an x-ray reading when he found the existence of clinical pneumoconiosis established. Employer further asserts that the administrative law judge erred in his

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[1] Claimant's first claim for benefits, filed on June 5, 1992, was denied by an administrative law judge on May 17, 1994, because claimant did not establish that he was totally disabled. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 8, 9. 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] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *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). 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).

analysis of the medical opinion evidence when he found that claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.[4]

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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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).

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). *See* 20 C.F.R. §718.201(a)(2). Initially, employer argues that the administrative law judge erred in his determination of the extent of claimant's smoking history. Employer's contention lacks merit. As the administrative law judge noted, the reports of claimant's smoking history varied. Accordingly, the administrative law judge considered in detail the relevant evidence on the issue that was generated in both claims, and he reconciled the varying histories by finding that claimant most frequently reported that he began smoking in 1955 and quit in 2002, and most frequently reported that he smoked one-half pack of cigarettes a day. Decision and Order at 4-5. The administrative law judge further found that claimant's statement that he smoked one-half pack per day was consistent with his testimony that he could not smoke when he was at work in the mine. The administrative law judge therefore determined that claimant had "at least a forty-seven year smoking history at the rate of at least a half-pack a day for about a 24 pack-year smoking history." Decision and Order at 5. Employer argues that although the administrative law judge properly determined the length of time claimant

[4] The administrative law judge's findings as to the length of claimant's coal mine employment, that the new evidence established total disability and a change in an applicable condition of entitlement, and that all of the relevant evidence established total disability, are unchallenged on appeal. *See* 20 C.F.R. §§718.204(b)(2), 725.309(d). Those findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

smoked, he erred in finding that claimant smoked one-half pack per day, because "[i]t is clear that the earlier smoking histories are probably more accurate, and these are in the one pack per day range." Employer's Brief at 4. The Board, however, is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Upon review, we conclude that the administrative law judge reasonably resolved the smoking history issue, and that substantial evidence supports his finding. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Therefore, we reject employer's allegation of error.

Employer next contends that the administrative law judge erred in relying on the opinion of Dr. Baker, and in discrediting the opinions of Drs. Broudy and Jarboe, in determining that legal pneumoconiosis was established.[5] Dr. Baker opined that claimant suffers from, *inter alia*, chronic obstructive pulmonary disease (COPD) due to both coal dust exposure and cigarette smoking. Director's Exhibits 14, 17. Drs. Broudy and Jarboe agreed that claimant suffers from COPD, but opined that the disease is due entirely to cigarette smoking. Director's Exhibits 19, 20; Employer's Exhibit 1.

The administrative law judge found that Dr. Baker's opinion was well-reasoned because although Dr. Baker initially questioned the accuracy of the smoking history that claimant reported when Dr. Baker examined him, Dr. Baker explained that both smoking and coal dust exposure were factors in causing claimant's lung disease.[6] The

[5] The administrative law judge accorded little weight to the previously submitted medical opinions of record, as those opinions were over thirteen years old at the time of the hearing. Employer does not challenge this aspect of the administrative law judge's decision. *See Skrack*, 6 BLR at 1-711.

[6] In his initial report following his examination of claimant, Dr. Baker noted that claimant reported "a history of approximately 5 years of smoking but I am not sure if this is accurate. . . . He may have smoked more than this. . . ." Director's Exhibit 14 at 17. Dr. Baker concluded that claimant's COPD was significantly contributed to, and substantially aggravated by, dust exposure in coal mine employment, and that it may have also been contributed to by cigarette smoking, depending on the extent of claimant's smoking history. *Id*. at 17-18. Subsequently, the district director provided Dr. Baker with a range of more extensive smoking histories that were recorded in 1992 and 1993 in claimant's previous claim, and asked Dr. Baker to "provide a detailed report regarding any changes of your prior opinion regarding . . . etiology, and pulmonary impairment due to coal dust exposure. . . ." Director's Exhibit 16. By letter dated August 18, 2006, Dr. Baker considered the relative contributions of smoking and coal dust exposure, assuming twenty-six years of coal mine employment, and smoking histories of less than fifteen pack-years, greater than fifteen pack-years, and of thirty-five to forty years at one pack per day. Director's Exhibit 17 at 1-2. Dr. Baker explained that the greater the smoking history, the more significant smoking would be as a cause of claimant's impairment. *Id*.

administrative law judge further found that, even after the district director provided Dr. Baker with a more extensive smoking history for his consideration, Dr. Baker adequately explained that both smoking and coal dust contributed to claimant's impairment, specifying that the relative degrees of contribution depended on the length of time that claimant smoked. The administrative law judge concluded that Dr. Baker adequately accounted for claimant's significant coal dust exposure, without ignoring his smoking.

Employer contends that the administrative law judge erred in finding Dr. Baker's report to be reasoned because it was "equivocal." Employer's Brief at 6. Employer essentially asks the Board to examine the credibility of Dr. Baker's opinion, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. Moreover, contrary to employer's assertion that Dr. Baker "hedged . . . relative to [the] causation" of claimant's COPD, Employer's Brief at 10, the record reflects Dr. Baker's affirmative statement that even if claimant had a smoking history of as much as "35 to 40 years at one pack per day," claimant's "26 years of coal dust exposure would also be a significant factor as well in the obstructive airway disease. . . ." Director's Exhibit 17 at 2.

Further, we reject employer's argument that Dr. Baker's opinion is legally insufficient to establish legal pneumoconiosis because Dr. Baker opined that if claimant had a thirty-five to forty pack-year smoking history, smoking "may be the . . . predominant cause" of his COPD. Director's Exhibit 17 at 2; Employer's Brief at 6-7. A miner's pulmonary impairment need only be "significantly related to" or "substantially aggravated by" exposure to coal mine dust, in order to establish the existence of legal pneumoconiosis. 20 C.F.R. §718.201(b). A miner need not demonstrate that his coal mine dust exposure was the sole or even the primary cause of his respiratory impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). In this case, even assuming a more extensive smoking history than was found by the administrative law judge, Dr. Baker opined that claimant's coal dust exposure was a significant factor in his COPD. Director's Exhibit 17 at 2. Thus, Dr. Baker's opinion is sufficient to support a finding of legal pneumoconiosis under 20 C.F.R. §718.201(b). We therefore reject employer's allegations of error in the administrative law judge's decision to find Dr. Baker's medical opinion to be a reasoned diagnosis of legal pneumoconiosis.[7]

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However, Dr. Baker maintained his opinion that claimant's history of twenty-six years of underground coal dust exposure was "a significant cause of his obstructive airway disease," and, along with smoking, was "a significant factor as well in the obstructive airway disease. . . ." Director's Exhibit 17 at 2.

[7] Because we affirm the administrative law judge's determination that Dr. Baker's opinion was reasoned on the above grounds, we need not address the administrative law judge's additional statement that Dr. Baker's opinion was "consistent with" the rebuttable

Employer contends that the administrative law judge erred in according little weight to the opinions of Drs. Broudy and Jarboe, that claimant's COPD is due solely to smoking. Employer's Brief at 7-10. We disagree. The administrative law judge permissibly found that Dr. Broudy did not adequately explain the basis for his opinion that coal dust exposure did not contribute to claimant's COPD, when he focused on the obstructive nature of claimant's impairment to conclude that it was due to smoking.[8] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-84 (6th Cir. 2007). Further, contrary to employer's contention that Dr. Broudy, in his physical examination report, provided specific reasons for concluding that claimant's impairment is unrelated to coal dust exposure, the record contains no explanation for Dr. Broudy's statement that claimant's COPD "is not occupationally related" and is "due to previous cigarette smoking." Director's Exhibit 20 at 4. Additionally, the administrative law judge was within his discretion to find that Dr. Jarboe did not adequately explain why claimant's partial response to treatment with bronchodilators necessarily eliminated legal pneumoconiosis, or why claimant's coal dust exposure did not contribute to his obstructive pulmonary condition. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). We also reject employer's argument that the administrative law judge failed to consider the qualifications of employer's physicians, Employer's Brief at 11, as the administrative law judge considered that Drs. Baker, Broudy, and Jarboe are all Board-certified in Internal Medicine and Pulmonary Disease. Because the administrative law judge has discretion as the trier-of-fact to render credibility determinations, and substantial evidence supports his findings, we affirm the administrative law judge's decision to accord less weight to the opinions of Drs. Broudy and Jarboe. *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*). Therefore, we affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4).[9]

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presumption of 20 C.F.R. §718.203(b), that pneumoconiosis in a miner with ten or more years of coal mine employment arose out of such employment.

[8] Specifically, after reviewing Dr. Baker's opinion, Dr. Broudy stated that "coal dust exposure when it causes severe impairment usually causes a restrictive defect, whereas in this case the impairment is obstructive in nature making it far more likely that it's due to cigarette smoking than coal dust exposure." Director's Exhibit 19 at 3.

[9] Because 20 C.F.R. §718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis, *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007), the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, based on the medical opinion evidence under Section 718.202(a)(4), is sufficient to support claimant's

Pursuant to Section 718.204(c), for the same reasons it raised with respect to the administrative law judge's finding of legal pneumoconiosis, employer contends that the administrative law judge erred in finding that claimant's legal pneumoconiosis is a substantially contributing cause of his total disability. Contrary to employer's contention, the administrative law judge permissibly relied on the "well-reasoned and well-documented" opinion of Dr. Baker that claimant is totally disabled due to both smoking and coal dust exposure, because it was based on objective tests and claimant's medical and work histories, and because Dr. Baker adequately explained why both smoking and coal dust exposure contributed to claimant's disabling impairment. *See Barrett*, 478 F.3d at 356-57, 23 BLR at 2-484-85; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge permissibly found that the contrary opinions of Drs. Broudy and Jarboe merited less weight as to disability causation because they were not well-reasoned as to the existence of legal pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 1-185-86 (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, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). We, therefore, affirm the administrative law judge's findings pursuant to Section 718.204(c), and we affirm the award of benefits.

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burden to establish pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005). Thus, we need not address employer's challenge to the administrative law judge's additional finding that the x-ray evidence established the existence of clinical pneumoconiosis under Section 718.202(a)(1). Employer's Brief at 5.

Accordingly, the administrative law judge's Decision and Order–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