BRB No. 09-0356 BLA

HOWARD CURTIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INLAND STEEL/LANCASHIRE COAL	)	
	)	
and	)	
	)	
ISPAT INLAND, INCORPORATED	)	DATE ISSUED: 01/27/2010
	)	
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 – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (08-BLA-5139) of Administrative Law Judge Michael P. Lesniak on a claim[1] 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). Adjudicating this claim pursuant to 20 C.F.R.

[1] Claimant filed his application for benefits on October 11, 2006. Director's Exhibit 2.

Part 718, the administrative law judge credited the parties' stipulations that claimant worked in qualifying coal mine employment for thirteen years and that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Considering the x-ray evidence, the medical opinion evidence, and the treatment records, the administrative law judge found that claimant established legal, but not clinical, pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.

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.[2] 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 establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge accorded the greatest weight to the opinions of Drs. Rasmussen and Parker because both physicians, although noting claimant's long smoking history, explained that both coal dust exposure and smoking substantially contributed to claimant's lung disease. The administrative law judge accorded some weight to the opinion of Dr. Altmeyer because it was supported with evidence from the record and medical literature. However, the administrative law judge

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

found the doctor's opinion, that claimant could be highly susceptible to the effects of tobacco smoke, but not coal dust, to be unconvincing. The administrative law judge gave little weight to the opinion of Dr. Celko because he failed to explain his conclusions regarding pneumoconiosis. The administrative law judge also gave little weight to the opinion of Dr. Fino because he failed to explain how the medical literature, to which he referred, related to claimant's case. The administrative law judge concluded that, on weighing all of the medical opinion evidence together, the greater weight of it established legal pneumoconiosis by establishing that claimant's coal dust exposure substantially contributed to the development of his chronic obstructive pulmonary disease/emphysema. Decision and Order at 15.

Challenging the administrative law judge's weighing of the conflicting medical opinions of record at Section 718.202(a)(4), employer argues that the administrative law judge impermissibly characterized the opinion of Dr. Fino and, in so doing, improperly discredited his opinion on the issue of legal pneumoconiosis. Citing pertinent text from the transcript of Dr. Fino's deposition, taken on April 30, 2008, employer argues that, contrary to the administrative law judge's determination, Dr. Fino applied the medical literature on which he relied to the instant case. Employer's Brief at 5-6, *citing* Employer's Exhibit 10 at 14-19. Employer further contends that the administrative law judge unreasonably credited the contrary opinions of physicians who diagnosed legal pneumoconiosis, because their opinions were premised on the belief that "when you have some coal mine dust exposure and a totally disabling obstructive disease from smoking cigarettes, coal mine dust exposure is always a significant contributing factor." Employer's Brief at 6. Employer contends, however, that the mere diagnosis of an obstructive impairment is not tantamount to a finding of legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2), particularly in cases, such as this, where physicians have attributed the miner's obstruction to cigarette smoking, rather than coal mine dust exposure. Hence, employer avers that the administrative law judge should have credited the opinion of Dr. Fino, as supported by that of Dr. Altmeyer, who opined that coal dust exposure neither caused nor aggravated claimant's underlying smoke-induced obstructive impairment.

A review of the administrative law judge's Decision and Order belies employer's argument that the administrative law judge erred in applying less weight to the opinion of Dr. Fino with respect to legal pneumoconiosis.[3] The administrative law judge noted that while Dr. Fino "attributed all of [c]laimant's lung disease and impairment to his tobacco smoke exposure," he admitted that "there could be some contribution to [c]laimant's

[3] In both his report of March 15, 2007 and his deposition of April 30, 2008, Dr. Fino diagnosed a disabling respiratory impairment due to severe emphysema secondary to cigarette smoking. Director's Exhibit 13; Employer's Exhibit 10.

impairment by his coal dust exposure, but opined that the contribution was clinically insignificant." Decision and Order at 14. The administrative law judge, within a permissible exercise of his discretion, found that Dr. Fino's opinion was less persuasive because, even though Dr. Fino indicated that he could distinguish coal-dust induced lung disease from cigarette smoke-induced lung disease, he "never explained how he was able to make such a distinction in [c]laimant's case." Decision and Order at 14; *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Further, the administrative law judge properly noted that Dr. Fino's opinion was entitled to little weight because, while Dr. Fino referred to medical literature in support of his conclusions, he "failed to explain how the literature related to [c]laimant's case." Decision and Order at 15. A review of the pages from Dr. Fino's deposition transcript cited by employer fails to reveal any discussion by Dr. Fino explaining how the medical literature, upon which he relied, specifically applied to claimant's case. *See* Employer's Exhibit 10 at 14-19; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Accordingly, we affirm the administrative law judge's accordance of little weight to Dr. Fino's opinion, for the reasons given.

Turning to the administrative law judge's consideration of the other medical opinions, the administrative law judge permissibly credited the opinions of Drs. Rasmussen and Parker, that claimant's coal dust exposure substantially contributed to the development of his chronic obstructive pulmonary disease. The administrative law judge properly credited the opinions because the physicians, while acknowledging claimant's extensive smoking history, thoroughly discussed how *both* coal dust exposure and smoking history caused claimant's lung disease. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-155; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 15. Thus, the administrative law judge's crediting of the opinions of Drs. Rasmussen and Parker was rational, supported by substantial evidence and in accordance with law. We, therefore, affirm the administrative law judge's determination that the medical opinion evidence established legal pneumoconiosis pursuant to Section 718.202(a)(4). Further, the administrative law judge properly weighed together all of the relevant evidence on both clinical and legal pneumoconiosis in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and determined that legal pneumoconiosis was established at Section 718.202(a).

Based on the foregoing, we affirm the administrative law judge's determination that the medical evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). In addition, we affirm the administrative law judge's determinations that claimant's pneumoconiosis arose out of

his coal mine employment pursuant to Section 718.203(b)[4] and that his total disability was due to pneumoconiosis pursuant to Section 718.204(c), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Hence, the administrative law judge properly found that claimant was entitled to benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[4] A finding at 20 C.F.R. §718.203 is subsumed in a finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(2); *see Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006). Accordingly, the administrative law judge's finding that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at Section 718.203(b) is harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).