BRB No. 10-0277 BLA

ARBERY KENEDA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAGNET COAL, INCORPORATED	)	DATE ISSUED: 01/25/2011
	)	
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 Second Remand Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Anne B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 on Second Remand Awarding Benefits (2004-BLA-05447) of Administrative Law Judge Daniel F. Solomon with respect to a subsequent claim filed on February 5, 2002, pursuant to the provisions of 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 codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is on appeal before the Board for the third time. In its most recent decision on this case,[2] the Board, pursuant to employer's appeal, vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to reconsider the x-ray and medical opinion evidence on the issue of pneumoconiosis at Section 718.202(a)(1) and (4). Specifically, the Board held that the administrative law judge failed to sufficiently explain why he found the opinion of Dr. Rasmussen better reasoned, than the opinions of Drs. Hippensteel and Castle, on the issue of whether claimant's chronic obstructive pulmonary disease (COPD) was due, in part, to coal mine employment. The Board held that the administrative law judge's failure to sufficiently explain his reasoning violated the requirements of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires an administrative law judge to provide an explanation for his or her findings of fact and conclusions of law. The Board also instructed the administrative law judge to reconsider, on remand, whether the medical opinions of Drs. Rasmussen, Hippensteel, Castle and Porterfield were sufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(4). The Board further held that, if, on remand, the administrative law judge found the existence of either clinical or legal pneumoconiosis established at Section 718.202(a)(4), he must then weigh all of the evidence together to determine whether the existence of pneumoconiosis is established at Section 718.202(a). Additionally, the Board held that, if the administrative law judge determines that pneumoconiosis is established at Section 718.202(a), he must then determine whether claimant's pneumoconiosis is due to coal mine employment at 20 C.F.R. §718.203(b) and whether claimant is totally disabled by pneumoconiosis at 20 C.F.R. §718.204(c).[3] *A.K.* [*Keneda*] *v. Magnet Coal, Inc.*, BRB No. 08-0595 BLA (May 29, 2009)(unpub.).

[1] Claimant's first claim for benefits, filed on November 5, 1998, was denied by the district director on May 4, 1999, because claimant failed to establish total disability. Director's Exhibit 1. Claimant took no further action on that claim.

[2] The lengthy history of this case is set forth in the Board's 2009 decision. *A.K.* [*Keneda*] *v. Magnet Coal, Inc.*, BRB No. 08-0595 BLA (May. 29, 2009)(unpub.).

[3] In an earlier decision, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant was totally disabled at 20 C.F.R. §718.204(b). The Board also affirmed the administrative law judge's finding that a change in an applicable condition of entitlement was established in this subsequent claim at 20 C.F.R. §725.309. *A.K.* [*Keneda*] *v. Magnet Coal, Inc.*, BRB No. 07-0253 BLA, slip op. at 7 (Oct. 29, 2007) (unpub.).

On remand, in finding legal pneumoconiosis established at Section 718.202(a)(4),[4] the administrative law judge found that the medical opinion of Dr. Rasmussen, that claimant has legal pneumoconiosis, was better reasoned and more consistent with the regulations, than the contrary opinions of Drs. Hippensteel and Castle. The administrative law judge also found that Dr. Porterfield's opinion supported a finding of legal pneumoconiosis. Considering all of the relevant evidence, the administrative law judge found that pneumoconiosis was established at Section 718.202(a) overall. Further, in light of his finding of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge found that it was unnecessary to apply the presumption of causality at 20 C.F.R. §718.203, as the finding of legal pneumoconiosis establishes the element of causality.[5] In addition, the administrative law judge found disability causation established at Section 718.204(c), based on the opinions of Drs. Rasmussen, Porterfield and Baker. The administrative law judge rejected the opinions of Drs. Hippensteel and Castle on the issue, because neither doctor diagnosed legal pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c) are unsupported by substantial evidence, and that the decision fails to comply with the requirements of the APA. Specifically, employer contends that the administrative law judge failed to sufficiently analyze the differences between the conflicting medical opinions, and therefore "committed the same errors" in finding legal pneumoconiosis established at Section 718.202(a)(4), as he had in his previous decision. Employer's Brief at 15. Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), responds, indicating that he will not file a response brief on the merits of the claim.

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,

[4] The administrative law judge found that the x-ray evidence did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 3. Further, it does not appear that the administrative law judge made a determination as to whether the medical opinion evidence (Drs. Rasmussen and Porterfield found the existence of both clinical and legal pneumoconiosis and Drs. Hippensteel and Castle found neither clinical or legal pneumoconiosis) established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 3-5.

[5] In a prior decision, the administrative law judge found that claimant established as many as thirty-nine years of coal mine employment. Administrative Law Judge's April 25, 2008 Decision and Order.

and in accordance with applicable law.[6] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 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 a finding of 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).

By Order dated May 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[7] The Director and employer agree that Section 1556 does not apply to this living miner's claim because it was filed prior to January 1, 2005. Employer also contends that Section 1556 is unconstitutional.

At the outset, we agree with the Director and employer that Section 1556 does not apply to this claim, as it was filed prior to January 1, 2005. Further, because Section 1556 does not apply to this case, we will not consider employer's arguments concerning its constitutionality. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

We turn to the merits of the administrative law judge's Decision and Order. After consideration of the arguments on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's Decision and Order is rational, supported by substantial evidence, and in accordance with law.

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[6] The law of the United States Court of Appeals for the Fourth Circuit is applicable, because claimant was employed in coal mining in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

[7] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act), reinstated, in pertinent part, the "15-year presumption" of totally disabling pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010.

Contrary to employer's arguments, in considering the medical opinion evidence at Section 718.202(a)(4), the administrative law judge permissibly accorded greater weight to the opinion of Dr. Rasmussen, on the ground that he was better-qualified than either Dr. Hippensteel or Dr. Castle. The administrative law judge specifically noted that Dr. Rasmussen was a noted expert in pneumoconiosis, who had done extensive research in the field.[8] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, contrary to employer's argument, the administrative law judge permissibly found Dr. Rasmussen's opinion better reasoned than the opinions of Drs. Hippensteel and Castle, as it was better supported by the underlying documentation and Dr. Rasmussen's findings were better explained. Specifically, the administrative law judge noted that Dr. Rasmussen, while acknowledging claimant's smoking history, obesity and heart disease, better explained how claimant's coal mine employment significantly contributed to his respiratory impairment and how his finding was supported by claimant's underlying medical data.[9]

[8] Dr. Rasmussen's curriculum vitae, in addition to stating that he is Board-certified in Internal Medicine, includes information as to his appointments to numerous national and state boards and committees dealing with pneumoconiosis and respiratory disease, testimony before the United States Senate and House of Representatives on the issue of pneumoconiosis, and numerous publications dealing with pneumoconiosis and respiratory diseases. Claimant's Exhibit 1.

The record reflects that Dr. Hippensteel is Board-certified in Internal Medicine and Pulmonary Disease and is a B reader. Dr. Hippensteel testified that his practice involves patients with pulmonary disease, including pneumoconiosis, and that while he has been involved in research dealing with chronic obstructive pulmonary disease (COPD), he has not specifically written anything about pneumoconiosis. Employer's Exhibit 2. The record further reflects that Dr. Castle is Board-certified in Internal Medicine and the subspecialty of Pulmonary Disease and is a B reader. Dr. Castle testified that while he has been involved in research dealing with COPD, he has not written anything about pneumoconiosis, specifically. Employer's Exhibit 3.

[9] Specifically, the administrative law judge noted that, among other factors, Dr. Rasmussen considered claimant's lengthy coal mine employment that began in 1958. Decision and Order at 2; Claimant's Exhibit 4 at 23. In addition, the administrative law judge noted that Dr. Rasmussen explained how the results of claimant's abnormal pulmonary function and blood gas studies supported his finding that coal mine employment contributed to his respiratory impairment and explained in detail how both smoking and coal mine employment caused identical forms of emphysema. Decision and Order at 2; Claimant's Exhibit 4 at 23-24. Further, the administrative law judge noted that Dr. Rasmussen explained how claimant's obesity and heart disease alone would not account for his abnormal pulmonary function and blood gas studies. Decision and Order at 3; Claimant's Exhibit 4 at 18.

See Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 2-3. Moreover, contrary to employer's argument, the administrative law judge permissibly accorded greater weight to Dr. Rasmussen's opinion of legal pneumoconiosis, as he found it supported by the opinion of Dr. Porterfield.[10] *See Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-113. Additionally, contrary to employer's argument, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Rasmussen because he found it more consistent with the regulations, that both coal mine employment and smoking cause an obstructive respiratory impairment, than the opinions of Drs. Hippensteel and Castle.[11] *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). In considering the contrary opinions of Drs. Hippensteel and Castle, the administrative law judge accorded them less weight since they believed that because claimant was no longer working in coal mine employment, his COPD would not progress as quickly as it had. Decision and Order at 2, 3. The administrative law judge permissibly found that such opinions were not consistent with the regulatory definition of pneumoconiosis as a latent and progressive disease. *See* 20 C.F.R. §718.201. As the administrative law judge properly evaluated the medical opinion evidence at Section 718.202(a)(4) and complied with the requirements of the APA in explaining the bases for his findings, we affirm the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4). Additionally, we affirm the administrative law judge's finding that pneumoconiosis at Section 718.202(a) overall was established, as the administrative law judge considered the x-ray evidence together with the medical opinion evidence in reaching his determination. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Turning to Section 718.204(c), we affirm the administrative law judge's finding that disability causation was established thereunder. Contrary to employer's argument, the administrative law judge was not required to reject the opinion of Dr. Rasmussen, because he did not distinguish between the disability caused by claimant's smoking-related heart disease and his coal dust exposure. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); Decision and Order on Remand at 5. Instead, the administrative law judge properly found that Dr. Rasmussen provided the most reasoned opinion on disability causation, based on his reliance on underlying data and his explanation for his findings. *See Clark*, 12 BLR at 1-155; *see* discussion *supra*. Further, the administrative

[10] Dr. Porterfield diagnosed emphysema secondary to coal dust exposure and smoking. Director's Exhibit 10.

[11] Contrary to employer's contention, the administrative law judge properly determined that Dr. Rasmussen diagnosed both a restrictive and an obstructive respiratory impairment, and found that claimant was totally disabled. Decision and Order at 4; Claimant's Exhibit 4 at 21.

law judge properly rejected the opinions of Drs. Hippensteel and Castle regarding disability causation, because they failed to find, contrary to the administrative law judge's finding, the existence of legal pneumoconiosis.[12] *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Consequently, we affirm the administrative law judge's finding that disability causation was established at Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order on Second Remand Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[12] As employer contends, the administrative law judge erroneously referred to an opinion of Dr. Baker as supporting a finding of disability causation. Decision and Order at 6. There is no opinion in the record from Dr. Baker. The administrative law judge's reference to the opinion of Dr. Baker is harmless error, however, since the administrative law judge's findings regarding the opinions of Drs. Rasmussen, Hippensteel and Castle support the administrative law judge's finding on disability causation at 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We note that there is no other reference to the opinion of Dr. Baker in the administrative law judge's decision.