

BRB No. 10-0280 BLA

ROY J. O'LEARY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	
)	DATE ISSUED: 01/21/2011
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 Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Cully & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-5937) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed 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). This case involves a subsequent claim filed on April 26, 2004.¹ In the initial decision, the administrative law judge found that the new

¹ Claimant's prior claim, filed on January 15, 1981, was denied by the district director on April 28, 1981 because claimant did not establish any of the elements of entitlement. Director's Exhibit 1.

evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2004 claim on the merits. After crediting claimant with at least thirty-three years of coal mine employment,² 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). The administrative law judge further found that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b) and 725.309 as unchallenged on appeal. *R.J.O. [O'Leary] v. Peabody Coal Co.*, BRB No. 08-0656 BLA (July 21, 2009). The Board, however, vacated the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and his finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* The Board also vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). *Id.*

On remand, the administrative law judge again found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD, due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

² The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. 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 (1989) (*en banc*).

On appeal, employer contends that the administrative law judge erred in finding that the x-ray evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 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. In a reply brief, employer reiterates its previous contentions.³

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'Keefe 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*).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis.⁴ On remand, the administrative law judge considered the opinions of Drs. Cohen, Repsher, and Fino.⁵ Drs. Cohen diagnosed legal pneumoconiosis, opining that claimant suffers from COPD (emphysema) caused by his coal mine dust exposure and cigarette smoking.

³ Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim because it was filed before January 1, 2005.

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).

⁵ Although the administrative law judge found that Dr. Simpao also diagnosed legal pneumoconiosis, he did not rely on his opinion in finding that the medical opinion established the existence of legal pneumoconiosis. *See* Decision and Order on Remand at 4.

Claimant's Exhibit 2. Although Drs. Repsher and Fino also diagnosed COPD (emphysema), they opined that it was due to cigarette smoking alone.⁶ Employer's Exhibits 1, 2.

In evaluating the conflicting evidence, the administrative law judge found that Dr. Repsher's opinion was not sufficiently reasoned. Decision and Order on Remand at 4. The administrative law judge accorded less weight to Dr. Fino's opinion because he found, *inter alia*, that it was based on an assumption contrary to the regulations, *i.e.*, that coal mine dust exposure does not contribute to COPD in the absence of clinical pneumoconiosis. *Id.* at 5. The administrative law judge credited Dr. Cohen's opinion, finding that his opinion was well reasoned and consistent with the regulations. *Id.* at 5-6. The administrative law judge also found that Dr. Cohen was the best qualified physician of record. *Id.* The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in relying on Dr. Cohen's opinion to support a finding of legal pneumoconiosis. Employer asserts that Dr. Cohen's opinion is not sufficiently reasoned. Employer also maintains that the administrative law judge provided claimant with an impermissible presumption that his COPD (emphysema) arose from his coal mine dust exposure. These arguments are without merit.

Dr. Cohen opined that claimant's pulmonary function studies showed a severe obstructive defect, along with severe diffusion impairment. Claimant's Exhibit 2 at 6. Dr. Cohen explained that this "is consistent with exposure to coal mine dust as well as tobacco smoke."⁷ *Id.* Dr. Cohen noted that modern medical and scientific studies

⁶ Dr. Repsher opined that there was no evidence of any pulmonary or respiratory disease that was caused, or aggravated by, claimant's coal mine dust exposure. Employer's Exhibit 1. Dr. Fino similarly opined that coal mine dust inhalation did not play a role in claimant's disabling respiratory impairment due to emphysema. Employer's Exhibit 2.

⁷ Dr. Cohen specifically explained that:

[H]ighly sophisticated studies of thousands of miners consistently show a relationship between coal dust exposure and declines in lung function: dust-caused impairment is at a level comparable to that of cigarette smoke and the effect of dust exposure on FEV1 is highly significant in both smokers and non-smokers. Once again, the results show a significant relationship

confirm the link between occupational exposure to coal mine dust and obstructive lung disease and emphysema. *Id.* at 8. Moreover, Dr. Cohen noted that obstructive lung disease from coal mine dust exposure can occur in the presence or absence of clinical pneumoconiosis. *Id.* at 7. Given claimant's forty year coal mine dust exposure history and his twenty to forty-two pack year smoking history, Dr. Cohen explained that both exposures were significant contributory factors to claimant's COPD. *Id.* at 13.

The administrative law judge permissibly accorded greater weight to Dr. Cohen's opinion because he found that it is consistent with the Department of Labor's recognition that smokers who mine have an additive risk for developing significant obstruction. Decision and Order on Remand at 5, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Because the administrative law judge specifically found that Dr. Cohen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's disabling COPD was due to both smoking and coal dust exposure, we affirm the administrative law judge's permissible finding that Dr. Cohen's diagnosis of legal pneumoconiosis is "reasoned," and sufficient to satisfy claimant's burden of proof. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 5-6. Moreover, because Dr. Cohen specifically opined that claimant's coal mine dust exposure caused his COPD, we affirm the administrative law judge's conclusion that Dr. Cohen's opinion is sufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b).

We reject employer's contention that the administrative law judge erred in his consideration of Dr. Repsher's opinion. The administrative law judge permissibly questioned Dr. Repsher's opinion, that claimant's COPD was due solely to smoking, because the physician did not adequately explain how he eliminated claimant's coal dust exposure as a source of claimant's obstructive impairment.⁸ *See Crockett Collieries, Inc.*

between the loss of function and coal dust exposure. Clearly, coal dust has deleterious effects on the pulmonary function of coal miners.

Claimant's Exhibit 2 at 9.

⁸ After noting that cigarette smoking is "the most common and powerful cause" of chronic obstructive pulmonary disease (COPD) and emphysema, Dr. Repsher opined that it "would be very unlikely" that claimant's coal mine dust exposure caused his COPD. Employer's Exhibit 1.

v. Barrett, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order on Remand at 4. The administrative law judge permissibly found that Dr. Repsher did not adequately explain why claimant's thirty-three years of coal dust exposure did not contribute, along with claimant's smoking history, to his COPD. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge, therefore, properly accorded less weight to Dr. Repsher's opinion.

Employer also contends that the administrative law judge erred in his consideration of Dr. Fino's opinion. We disagree. Dr. Fino ruled out coal dust exposure as a significant factor in claimant's emphysema based, in part, on his view that the amount of emphysema due to coal dust exposure is based on the degree of clinical pneumoconiosis that is present.⁹ Employer's Exhibit 2 at 11. The administrative law judge permissibly accorded less weight to Dr. Fino's opinion because it is inconsistent with the Department of Labor's recognition that coal dust can contribute significantly to a miner's obstructive lung disease independent of clinical pneumoconiosis.¹⁰ Decision and

⁹ In assessing whether claimant's coal dust exposure contributed to his emphysema, Dr. Fino found that the "amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema." Employer's Exhibit 2. Dr. Fino explained that:

Dr. Leigh found that a non-smoking coal miner with an average lung content (correlating with minimal or sparse pneumoconiosis) has 7-10% more emphysema than a non-smoking man not exposed to coal dust. Extrapolating this to pulmonary function results, a 10% increase above normal in the amount for emphysema correlated to a 7% reduction in the FEV1%.

This reduction is not clinically significant in the average miner. However, it could be clinically significant if there was moderate or profuse pneumoconiosis present because the amount of pneumoconiosis correlates quite well with the amount of emphysema present. Therefore, it is very helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal mine dust inhalation.

Employer's Exhibit 2.

¹⁰ Because the administrative law judge provided a proper basis for according less weight to the opinions of Drs. Repsher and Fino, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Repsher and Fino. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Order at 5; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000) (indicating that “[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]”); *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

We, therefore, 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).¹¹

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant’s total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer’s contention lacks merit. The administrative law judge rationally discounted the opinions of Drs. Repsher and Fino 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 on Remand at 7-8. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Cohen to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Cohen’s opinion supports 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 20 C.F.R. 718.204(c). We, therefore, affirm the administrative law judge’s award of benefits.

¹¹ In light of our affirmance of 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), we need not address the administrative law judge’s finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

Attorney's Fee

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed during his previous appeal to the Board pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of \$1,991.00 for 9.05 hours of legal services at an hourly rate of \$220.00. No objections to the fee petition have been received. We find the fee to be reasonable in light of the services performed, and approve a fee of \$1,991.00, to be paid directly to claimant's counsel by employer.¹² 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹² An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).