BRB No. 12-0213 BLA

RONALD E. GROVES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 01/23/2013
	)	
and	)	
	)	
PEABODY INVESTMENTS	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-05342) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on February 22, 2008.[1] Director's Exhibit 2.

After crediting claimant with twenty-one years of coal mine employment,[2] the administrative law judge found that the medical evidence developed since the denial of claimant's previous claim established that claimant has legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4).[4] The administrative law judge therefore found that claimant established a change in the applicable condition of entitlement since the denial of his prior claim, pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that the medical opinion evidence established that claimant has legal pneumoconiosis.[5] The administrative law judge

[1] Claimant's prior claim, filed on May 6, 2003, was finally denied because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Groves v. Peabody Coal Co.*, BRB No. 06-0510 BLA (Nov. 29, 2006) (unpub.); Director's Exhibit 2 (prior claim).

[2] Claimant's coal mine employment was in Ohio. Hearing Tr. at 25. 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] 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).

[4] The administrative law judge found that the new x-ray and medical opinion evidence did not establish the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1),(4). 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).

[5] The administrative law judge found that claimant was unable to invoke the presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he did not establish that the conditions in his surface

further found that the medical evidence established that claimant is totally disabled by a respiratory impairment, and that legal pneumoconiosis is a substantially contributing cause of his total disability, pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that claimant established legal pneumoconiosis, and that he is totally disabled due to legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in referring to the regulatory preamble when assessing the credibility of the medical opinion evidence on the issue of legal pneumoconiosis.[6] In a reply brief, employer reiterates its arguments on appeal.[7]

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).

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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the

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coal mine employment were substantially similar to those in underground mining. *See* 30 U.S.C. §921(c)(4).

[6] The Director argues further that if the Board vacates the award of benefits, it should instruct the administrative law judge to reconsider whether claimant can invoke the Section 411(c)(4) presumption. Specifically, the Director contends that the administrative law judge failed to consider all of the relevant evidence regarding the dust conditions in claimant's surface coal mine employment. Director's Brief at 5 n.1.

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has twenty-one years of coal mine employment and is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish that he had pneumoconiosis. Director's Exhibit 2 (prior claim). Consequently, to obtain review of the merits of his subsequent claim, claimant had to submit new evidence establishing that he has pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

After concluding that the new x-ray and medical opinion evidence failed to establish that claimant has clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1),(4), the administrative law judge considered whether the new medical opinions of Drs. Cohen, Schaaf, Rosenberg, and Renn established that claimant has legal pneumoconiosis,[8] pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 20-21, 23-27. Dr. Cohen diagnosed claimant with COPD, chronic bronchitis, and emphysema, and opined that coal mine dust exposure was "significantly contributory" to claimant's lung disease. Director's Exhibit 20 at 6-11. Dr. Schaaf also diagnosed claimant with COPD and chronic bronchitis, due to both coal mine dust exposure and smoking. Director's Exhibit 20 at 21. Dr. Rosenberg opined that claimant's COPD is due solely to smoking, and is unrelated to coal mine dust exposure. Director's Exhibit 29; Employer's Exhibit 4. Dr. Renn opined that claimant suffers from COPD and emphysema due solely to smoking, and from asthma that is unrelated to coal mine dust exposure. Employer's Exhibit 8, 19, 25.

The administrative law judge found the opinions of Drs. Cohen and Schaaf, that claimant's COPD is due, in part, to coal mine dust exposure, to be well-reasoned, well-documented, and "credible diagnos[e]s of legal pneumoconiosis." Decision and Order at 24-25. The administrative law judge discounted the opinions of Drs. Rosenberg and Renn, that claimant's COPD is due solely to smoking, finding them to be based on reasoning inconsistent with the premises underlying the regulations, as set forth by the Department of Labor (DOL) in the regulatory preamble when it revised the definition of pneumoconiosis. The administrative law judge further found that Dr. Rosenberg did not adequately explain how he concluded that coal mine dust exposure did not contribute to claimant's emphysema. Therefore, the administrative law judge credited the opinions of Drs. Cohen and Schaaf over those of Drs. Rosenberg and Renn, and found that the new evidence established the existence of legal pneumoconiosis. *Id*. at 27-29.

[8] The administrative law judge also considered Dr. Lenkey's opinion diagnosing COPD due to coal mine dust exposure, but did not rely on it because he found that Dr. Lenkey's opinion was not as thorough or detailed as those of the other physicians. Decision and Order at 25; Director's Exhibit 11.

Employer contends that the administrative law judge erred because he failed to compare the new medical evidence with the evidence submitted in the prior claim to determine whether the new evidence differs qualitatively, so as to establish "an actual material change in condition, *i.e.*, a worsening in claimant's condition since the prior denial." Employer's Brief at 19. The United States Court of Appeals for the Sixth Circuit has held that, under the version of 20 C.F.R. §725.309(d) applicable to claims filed after January 19, 2001, such as this one, no such comparison is required to establish a "change in an applicable condition" of entitlement:

> We construe the term "change" to mean disproof of the continuing validity of the original denial . . . rather than the actual difference between the bodies of evidence presented at different times. Under this definition, the [administrative law judge] need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present.

Buck Creek Coal Co. v. Sexton, F.3d , No. 11-4304, 2013 WL 135352 at *3 (6th Cir. Jan. 10, 2013), *quoting Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486 (6th Cir. 2012)(internal citations omitted). Therefore, contrary to employer's contention, the administrative law judge properly considered whether the new evidence established the existence of pneumoconiosis. *See* 20 C.F.R. §725.309(d)(3); *Banks*, 690 F.3d at 486.

Employer next argues that the administrative law judge erred by referring to the preamble to the regulations in evaluating the credibility of the medical opinions regarding legal pneumoconiosis. Employer's Brief at 10-15. This argument lacks merit. The administrative law judge had discretion to consult the preamble to the regulations as an authoritative statement of medical principles accepted by DOL when it revised the definition of pneumoconiosis to include obstructive respiratory or pulmonary impairments arising out of coal mine employment. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Moreover, contrary to employer's argument, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, 694 F.3d at 802; *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). Employer's argument that the administrative law judge erred by referring to the preamble is therefore rejected.

Employer contends that, even if the administrative law judge could refer to the preamble, substantial evidence does not support his determination that Drs. Rosenberg

and Renn relied on reasoning that was contrary to the medical and scientific premises set forth in the preamble to the regulations. Employer's Brief at 15-17. This contention lacks merit.

In concluding that claimant does not have legal pneumoconiosis, Dr. Rosenberg explained his opinion that the pattern of obstruction on claimant's pulmonary function studies is not consistent with coal mine dust exposure. The administrative law judge accurately characterized Dr. Rosenberg's opinion that, when obstructive lung disease is caused by smoking, the FEV1/FVC ratio is reduced, but that when it is caused by coal mine dust, patients experience "symmetrical" reductions in FEV1 and FVC, "such that the [FEV1/FVC] ratio remains the same." Employer's Exhibit 24 at 52. Because claimant's FEV1/FVC ratio is reduced, Dr. Rosenberg concluded that claimant does not have legal pneumoconiosis, and that his COPD is due solely to smoking. *Id*. at 57; Director's Exhibit 29 at 6. As the administrative law judge explained, DOL found that the medical literature underlying its revision of the definition of legal pneumoconiosis establishes that coal mine dust exposure can cause a significant decrease in the FEV1/FVC ratio. Decision and Order at 26, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Further, the administrative law judge accurately noted Dr. Renn's testimony that he can distinguish between emphysema caused by coal dust and emphysema caused by smoking, and that claimant "has only bullous emphysema," which Dr. Renn asserted is caused by smoking but not by coal mine dust. Employer's Exhibit 25 at 49-51, 60-61. The administrative law judge, however, noted that in the preamble to the regulations, the DOL found, based on medical literature, that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order at 27, *quoting* 65 Fed. Reg. at 79943. In sum, the administrative law judge permissibly found that the opinions of Drs. Rosenberg and Renn on the etiology of claimant's COPD merited less weight, because the doctors relied on premises at odds with the medical science credited by DOL when it promulgated the revised regulation defining legal pneumoconiosis.[9] *See Adams*, 694 F.3d at 801-02.

Employer argues further that the administrative law judge erred in relying on the opinions of Drs. Cohen and Schaaf to find the existence of legal pneumoconiosis established. Employer contends that their opinions are unreasoned, because the doctors concluded that claimant's COPD was caused by coal mine dust exposure simply because

[9] Because the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Renn for the reasons discussed above, we need not address employer's additional arguments challenging the administrative law judge's analysis of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

coal dust can cause obstructive lung disease. Employer's Brief at 19-20. Employer's contention lacks merit.

The determination of whether a medical opinion is adequately reasoned is committed to the discretion of the administrative law judge. *See Director, OWCP v. Rowe,* 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Here, substantial evidence supports the administrative law judge's determination that Drs. Cohen and Schaaf based their opinions on their examinations of claimant, his coal mine employment and smoking histories, and the results of objective testing. Decision and Order at 10-12, 24-25; Director's Exhibit 20; Claimant's Exhibit 3. Further, the administrative law judge accurately found that Dr. Cohen "referred to numerous studies and medical literature linking coal dust exposure to COPD and emphysema" in support of his opinion. Decision and Order at 24; Director's Exhibit 20 at 5-9. Additionally, contrary to employer's contention, Dr. Schaaf distinguished between his diagnosis of clinical pneumoconiosis, which he based on an x-ray reading, and his diagnosis of legal pneumoconiosis, which he based on claimant's obstructive lung disease detected on pulmonary function studies. Claimant's Exhibit 3 at 43. In sum, substantial evidence supports the administrative law judge's permissible determination that Drs. Cohen and Schaaf rendered well-reasoned opinions diagnosing legal pneumoconiosis, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987), and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the administrative law judge's finding of the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[10]

Finally, employer challenges the administrative law judge's finding, based on the opinions of Drs. Cohen, Lenkey, and Schaaf, that claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Employer contends that the administrative law judge failed to assess whether the opinions were sufficiently reasoned to establish disability causation. Employer's Brief at 22. Because the administrative law judge permissibly relied on the well-reasoned, well-documented, and "credible" opinions of Drs. Cohen and Schaaf to find that claimant established the existence of legal pneumoconiosis, in the form of disabling COPD that is significantly related to, or substantially aggravated by, coal mine dust exposure, Decision and Order at 24-25, he

[10] Employer does not challenge the administrative law judge's determination, on the merits, to accord greater weight to the more recent evidence establishing legal pneumoconiosis than to the earlier medical evidence, in view of the progressive nature of pneumoconiosis. Decision and Order at 30. That determination is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

reasonably found that their opinions supported a determination that legal pneumoconiosis is a "substantially contributing cause" of claimant's total disability, pursuant to 20 C.F.R. §718.204(c).[11] *See Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 303 (6th Cir. 2001); Decision and Order at 36-37. Consequently, we reject employer's argument, and 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.

Accordingly, the administrative law judge's Decision and Order 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

[11] We need not address employer's argument that the administrative law judge erred in also relying on Dr. Lenkey's opinion, when he discounted it at 20 C.F.R. §718.202(a)(4) on the issue of legal pneumoconiosis. Because the medical opinions of Drs. Cohen and Schaaf constitute substantial evidence in support of the finding of disability causation at 20 C.F.R. §718.204(c), any error by the administrative law judge with respect to Dr. Lenkey's opinion would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986).