BRB No. 06-0785 BLA

THOMAS A. JASPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	DATE ISSUED: 07/24/2007
	)	
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–Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Sara M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-5622) of Administrative Law Judge Daniel L. Leland awarding benefits on a 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). This case involves a miner's claim filed on December 18, 2002, which is now before the Board for the second time. In his Decision and Order – Awarding Benefits issued on April 12, 2005, the administrative law judge credited claimant with twenty-two years of coal mine employment[1] and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1),(4), 718.203(b). The administrative law judge further found that claimant was totally disabled by a respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2), 718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer filed an appeal, challenging the administrative law judge's findings at 20 C.F.R. 718.202(a)(1),(4).[2] Employer specifically argued that that the administrative law judge erred in considering the opinion of Dr. Begley because the physician based his diagnosis, that claimant suffered from pneumoconiosis, in part, on an x-ray reading that had not been properly admitted into evidence pursuant to 20 C.F.R. §718.414(a). On appeal, the Board affirmed the weight the administrative law judge accorded the x-ray evidence and his finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Jasper v. Keystone Coal Mining Corp.*, BRB No. 05-0678 BLA, slip op. at 3-4 (Jan. 30, 2000) (unpub.). The Board, however, vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) based on employer's evidentiary challenge. *Jasper*, slip. op. at 4. *Citing Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, J.J., concurring and dissenting), the Board instructed the administrative law judge to consider whether the opinions of Drs. Begley and Renn were tainted by their review of x-ray readings that had not properly admitted into the record, and to address the implication of 20 C.F.R. §725.414(a)(2)(i) and

[1] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[2] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding of twenty-two years of coal mine employment; his determination that claimant had a smoking history of approximately seventeen to thirty-five pack-years; his findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (3), and his finding that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Jasper v. Keystone Coal Mining Corp.*, BRB No. 05-0678 BLA, slip. op at 2 n.3 (Jan. 30, 2000) (unpub.).

725.414(a)(3)(i) on the weight to be accorded those opinions.[3] *Jasper*, slip op. at 5. The Board further directed the administrative law judge to consider whether the physicians' opinions finding that claimant had pneumoconiosis, were based on more than an x-ray reading and coal mine employment history, and thus sufficiently reasoned to constitute probative evidence to support claimant's burden of proof. *Id.* Finally, the Board instructed the administrative law judge to separately consider whether the miner suffered from either clinical or legal pneumoconiosis.[4] *Id.*

On remand, the administrative law judge factored in Dr. Begley's partial reliance on an excluded x-ray reading in evaluating the probative value of his opinion at Section 718.202(a)(4). The administrative law judge determined that Dr. Begley's diagnosis of clinical pneumoconiosis was reasoned and documented, notwithstanding Dr. Begley's reliance on a positive reading x-ray for pneumoconiosis that had not been accepted as evidence in the record, since the doctor had also based his diagnosis of clinical pneumoconiosis on other positive x-rays of record, his physical examination findings, and the results of claimant's pulmonary function and arterial blood gas studies. Decision and Order on Remand at 2. Under Section 718.202(a)(4), the administrative law judge credited the opinions of Drs. Schaaf and Begley, that claimant suffered from clinical pneumoconiosis, over the contrary opinions of Drs. Fino and Renn.[5] Decision and Order

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[3] The Board noted that the evidence admitted into the record pursuant to 20 C.F.R. §725.414 did not include Dr. Begley's interpretation of an x-ray taken on August 30, 2004, but that the doctor had referred to this reading in his report, in which he concluded that claimant suffers from coal workers' pneumoconiosis, *see* Claimant's Exhibit 8. *Jasper*, slip op. at 4. In addition, the Board noted that Dr. Renn not only referenced his own reading of the November 9, 2002 x-ray, previously withdrawn from the record, but also reviewed Dr. Begley's report, including Dr. Begley's reading of the August 30, 2004 x-ray, in concluding that claimant does not suffer from pneumoconiosis. Employer's Exhibit 2.

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201.

[5] Dr. Schaaf diagnosed coal workers' pneumoconiosis, coronary artery disease and moderate obstructive airways disease. He related claimant's obstructive airways disease to both pneumoconiosis and smoking. Director's Exhibit 10. Dr. Illuzzi opined that from a pulmonary standpoint there was no evidence of significant disability or coal worker's pneumoconiosis. Director's Exhibit 12. Dr. Illuzzi opined that claimant was totally disabled for his prior work but that the disability was most likely due to cardiac disease. *Id*. Dr. Fino diagnosed chronic obstructive pulmonary disease with chronic bronchitis and emphysema due to smoking. He did not diagnose coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Fino opined that claimant was totally disabled as a result of

on Remand at 2-3. Under 20 C.F.R. §718.202(a)(4), weighing the medical opinions in conjunction with the x-ray evidence, the administrative law judge found that claimant established the existence of coal workers' pneumoconiosis (clinical pneumoconiosis), and the existence of legal pneumoconiosis as defined at 20 C.F.R. §718.201. The administrative law judge further found that claimant was totally disabled due to both coal workers' pneumoconiosis (clinical pneumoconiosis) and legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred by failing to evaluate Dr. Fino's testimony, as to the relevance of claimant's normal lung volume tests, in the administrative law judge's discussion of whether claimant suffered from either clinical or legal pneumoconiosis. Employer also contends that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits.[6] The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that the administrative law judge properly addressed Dr. Fino's testimony with regard to the lung volumes tests in his discussion of whether claimant established the existence of clinical pneumoconiosis. Director's Letter Brief at 2. The Director explains that the "proper inquiry here is not whether the doctor's opinion is more relevant to clinical or to legal pneumoconiosis," and further notes that "because the methods for proving pneumoconiosis set forth at [20 C.F.R. §718.202(a)(1)–(4)] are not disjunctive, the [administrative law judge] was only required to weigh Dr. Fino's testimony at some point in the pneumoconiosis inquiry; that is, the [administrative law judge] was obliged to weigh the positive evidence for pneumoconiosis against all relevant evidence."

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smoking and not coal dust exposure. Dr. Begley diagnosed coal workers' pneumoconiosis and attributed claimant's chronic obstructive pulmonary disease to coal mine employment. Claimant's Exhibit 7. Dr. Begley opined that claimant's coal workers' pneumoconiosis is a significant contributing factor to his pulmonary impairment. *Id.* Dr. Renn diagnosed chronic bronchitis due to cigarette smoking and possible emphysema due to smoking. He did not find the presence of coal workers' pneumoconiosis, and opined that claimant was totally disabled by an obstructive respiratory impairment due to smoking. Employer's Exhibit 5.

[6] Claimant asserts that employer is precluded from arguing that the administrative law judge erred in evaluating Dr. Fino's opinion, since employer did not advance its argument with respect to the lung volume studies in its prior appeal. We decline to address claimant's argument, as we affirm herein the administrative law judge's award of benefits.

Director's Letter Brief at 2, citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Because the administrative law judge considered all of the relevant evidence in finding that claimant suffered from clinical pneumoconiosis, the Director urges the Board to reject employer's assertion of error with regard to the lung volume testing. Employer has filed a reply brief, reiterating its argument that the administrative law judge failed to consider Dr. Fino's testimony relevant to the issue of clinical or legal pneumoconiosis.

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).

Employer asserts that the administrative law judge failed to give proper consideration to Dr. Fino's testimony that the evidence is insufficient to support a finding that claimant has either clinical or legal pneumoconiosis "because pneumoconiosis produces reduced lung volumes, yet [claimant's] lung volumes are elevated."[7] Employer's Brief at 5-6; *see* Employer's Exhibit 11 at 9-10. In his discussion of whether claimant had established the existence of clinical pneumoconiosis, the administrative law judge noted the following with respect to Dr. Fino's deposition testimony:

> Dr. Fino stated that the miner's normal lung volumes are inconsistent with a finding of pneumoconiosis, but his observation is more relevant to the existence of legal pneumoconiosis than clinical pneumoconiosis…. Employer argues that lung volume testing is more probative than chest x-rays, but the regulations specifically provide that a finding of pneumoconiosis may be based on a positive chest x-ray but do not refer to lung volumes as diagnostic tool [sic] for establishing the existence of pneumoconiosis. Dr. Fino's opinion that claimant does not have pneumoconiosis is against the weight of the x-ray evidence and therefore entitled to little weight.

[7] Dr. Fino testified that claimant's pulmonary function testing revealed an obstructive abnormality with no improvement following the administration of bronchodilators. Employer's Exhibit 11 at 9. He further stated that claimant's lung volumes showed no pulmonary fibrosis. *Id.* According to Dr. Fino, coal workers' pneumoconiosis "can frequently be a fibrotic condition and as such there is no evidence of a fibrotic condition in this case because there is no decrease in the lung volumes." Employer's Exhibit 11 at 9-10.

Decision and Order on Remand at 3.

Employer takes issue with the administrative law judge's statement that Dr. Fino's comments are more relevant to the issue of legal pneumoconiosis. Employer asserts that since Dr. Fino found that the miner's normal lung volumes did not support a finding of fibrosis in the miner's lung tissue, Dr. Fino's testimony must be seen as being relevant to whether claimant has clinical pneumoconiosis, which condition is defined as being "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 [emphasis added]." *See* 20 C.F.R. §718.201; Employer's Brief in Support of Petition for Review at 6. Because employer contends that Dr. Fino has explained why claimant has no evidence of fibrosis based on the normal lung volume testing, and therefore no findings consistent with the regulatory definition of clinical pneumoconiosis, employer asks the Board to reverse the administrative law judge's finding of clinical pneumoconiosis as a matter of law. Employer's Brief in Support of Petition for Review at 7.

We decline to reverse the administrative law judge's finding of clinical pneumoconiosis. Contrary to employer's contention, the administrative law judge specifically addressed Dr. Fino's testimony in his assessment of the evidence for and against a finding of clinical pneumoconiosis, *see Williams*, 114 F.3d at 24; 21 BLR at 2-104, and permissibly found that the mere presence of normal lung volume test results did not undermine the probative value of the positive x-ray evidence for detecting the presence or absence of clinical pneumoconiosis, particularly since the Department of Labor did not recognize lung volume testing as a diagnostic tool for pneumoconiosis under 20 C.F.R. §718.202(a). Decision and Order on Remand at 3. The administrative law judge permissibly determined that Dr. Fino's opinion, that claimant did not have clinical pneumoconiosis, was entitled to less weight since the doctor's conclusion was against the weight of the positive x-ray evidence. 20 C.F.R. §718.202(a)(1); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152 (1984). Moreover, the administrative law judge had discretion to credit the opinions of Drs. Begley and Schaaf, that claimant suffered from clinical pneumoconiosis, because the administrative law judge found their opinions to be documented, and reasoned, and better supported by the objective evidence.[8] *See Clark v.*

[8] The administrative law judge determined that Dr. Renn's opinion, that claimant did not have clinical pneumoconiosis, was contrary to the weight of the x-ray evidence, particularly in view of his reliance on excluded negative x-ray readings. Decision and Order on Remand at 3. Employer does not challenge the weight accorded Dr. Renn's opinion; therefore, the administrative law judge's determination with regard to Dr. Renn is affirmed. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

Karst-Robbins Coal Co., 12 BLR 1-149 (1989) (*en banc*). Therefore, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis by a preponderance of the credible positive x-rays and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1),(4). *See Williams*, 114 F.3d at 24; 21 BLR at 2-111.

Employer also challenges the administrative law judge's finding relevant to disability causation at 20 C.F.R. §718.204(c). In finding that claimant was totally disabled due to pneumoconiosis, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Renn, that claimant's respiratory disability was unrelated to coal worker's pneumoconiosis because neither of these physicians were of the opinion that claimant suffered from coal worker's pneumoconiosis (clinical pneumoconiosis), contrary to the finding of the administrative law judge. *Scott v. Mason Coal Co*., 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). In contrast, the administrative law judge properly found that the reasoned and documented opinion of Dr. Begley was sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.204(c) since Dr. Begley specifically opined that claimant was totally disabled due in part to coal workers' pneumoconiosis. Thus, we affirm as supported by substantial evidence, the administrative law judge's determination that claimant established total disability due to pneumoconiosis.

Because claimant has established all of the requisite elements of entitlement, we affirm the administrative law judge's finding that claimant is entitled to benefits.[9] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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[9] Employer argues that the administrative law judge erred in crediting Dr. Illuzzi's opinion as to the etiology of claimant's chronic obstructive pulmonary disease. Because we affirm the administrative law judge's determination that claimant is totally disabled due to coal workers' pneumoconiosis (clinical pneumoconiosis), we decline to address employer's argument that the administrative law judge erred in his treatment of Dr. Illuzzi's opinion, that the administrative law judge erred "when he failed to consider the lung volume testing as a part of the evidence addressing legal pneumoconiosis" under 20 C.F.R. §718.202(a)(4), or that he erred in his consideration of the conflicting medical opinions on that issue, Employer's Brief in Support of Petition for Review at 7-14, as any error committed by the administrative law judge with respect to whether claimant also established the existence of legal pneumoconiosis is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge