BRB No. 08-0738 BLA

G.G.F.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 07/30/2009
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED	)	
	)	
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 – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order – Award of Benefits (2004-BLA-5296) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim[1]

[1] The administrative law judge found that claimant's original claim, filed on May 21, 1990, contains no medical evidence and was administratively closed due to abandonment, on September 14, 1990. Decision and Order at 3, 9; Director's Exhibit 1. Because employer does not contest the accuracy of the administrative law judge's

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). The administrative law judge determined that the record in claimant's prior claim contained no medical evidence, and that the claim was denied by reason of abandonment. Turning to the subsequent claim, the administrative law judge accepted employer's stipulations that claimant had at least thirty-four years of coal mining employment and that claimant was totally disabled from a pulmonary standpoint pursuant to 20 C.F.R. §718.204(b), as supported by the record. He further found that the medical opinion evidence established both clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4),[2] 718.203(b), and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's analysis and weighing of the medical opinion evidence. Specifically, employer asserts that the medical opinion evidence fails to establish clinical and legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), fails to establish that pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b), and fails to establish that claimant's total disability was due to pneumoconiosis (disability causation) under 20 C.F.R. §718.204(c). Claimant has not responded to the appeal. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

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assessment of the procedural posture of this claim, we reject, at the outset, employer's assertion that the administrative law judge's "failure to make any findings under Section 725.309 alone requires remand." Employer's Brief at 9. For purposes of 20 C.F.R. §725.309, a denial by reason of abandonment is deemed a finding that the claimant has not established any applicable condition of entitlement. 20 C.F.R. §725.409(c). Thus, employer's concession that claimant is totally disabled from a pulmonary standpoint, which the administrative law judge found was supported by the record, establishes the requisite change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). *See* Decision and Order at 9-10.

[2] The administrative law judge found that pneumoconiosis was not established under 20 C.F.R. 718.202(a)(1)-(3).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the miner's coal mining employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200(1989)(*en banc*); Decision and Order at 3; Director's Exhibit 26.

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 is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's analysis of the evidence was reasonable and that he properly awarded benefits on this claim.

Employer first contends that the administrative law judge's opinion is confusing because he conflates his findings regarding clinical and legal pneumoconiosis and he states, on the one hand, that all of the opinions are "reasoned and documented," but then accords greater weight to the opinions of Dr. Cole. The only confusion, however, is in employer's misreading of the administrative law judge's decision. The administrative law judge's decision reflects that he found that legal pneumoconiosis was established on the basis of Dr. Cole's opinion, *i.e.* that claimant's chronic obstructive pulmonary disease (COPD) and emphysema were caused in substantial part by the coal dust exposure in his coal mine employment. *See* Decision and Order at 14. The administrative law judge determined that the credibility of Dr. Cole's opinion was reinforced by his demonstrated understanding of the x-rays as a diagnostic tool of coal workers' pneumoconiosis. Both Dr. Cole and the administrative law judge were clear that claimant's x-rays did not have readings with ILO classifications for coal workers' pneumoconiosis. This is the gold standard by which clinical pneumoconiosis is established at Section 718.202(a)(1). *See* 20 C.F.R. §718.102. Nevertheless, Dr. Cole explained that claimant's x-rays showed linear fibrosis which is consistent with coal workers' pneumoconiosis. Dep. at 16-17, 35. The doctor made clear his diagnosis was based on many factors. Dep. at 12-13. The administrative law judge concluded that the doctor's well-reasoned and well-documented opinion established not only legal pneumoconiosis at Section 718.202(a)(4), but also clinical pneumoconiosis, because the doctor explained that claimant's x-rays showed the fibrotic reaction of the lung tissue to the deposition of coal dust caused by dust exposure in coal mine employment, thereby satisfying the definition of clinical pneumoconiosis. Section 718.201(a)(1). The doctor concluded that coal workers' pneumoconiosis is "a component …" of claimant's disabling lung disease. Dep. at 46. Employer's argument is, therefore, rejected.

We also reject employer's argument that the administrative law judge's Decision and Order is confusing because the administrative law judge found that all of the opinions

of record was "reasoned and documented" but then rejected the opinions of Drs. Repsher and O'Bryan as unreasoned. The administrative law judge found that the opinions of Drs. Repsher and O'Bryan were sufficiently reasoned and documented to be probative of the issue of pneumoconiosis. This finding does not, however, preclude him from ultimately according greater weight to the opinion of Dr. Cole because he found it better reasoned. Decision and Order at 14. *Lucostic v United States Steel Corp.*, 8 BLR 1-46 (1985). In conclusion, therefore, employer's argument that the Decision and Order must be remanded for clarification is rejected.

Further, contrary to employer's argument, the administrative law judge permissibly credited on Dr. Cole's opinion,[4] finding legal pneumoconiosis, because, *inter alia*, the doctor relied on the fact that claimant's post-bronchodilator pulmonary function study showed no improvement. The administrative law judge reasonably concluded that the doctor found that these results showed evidence of a chronic and progressive respiratory disease consistent with legal pneumoconiosis. *See* 20 C.F.R. §718.201; *see also Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Moreover, we note that in addition to the results of this pulmonary function study, the administrative law judge also considered the fact that Dr. Cole conducted multiple physical examinations, reviewed x-rays of claimant showing lung damage consistent with coal dust exposure, and considered claimant's smoking and employment histories in finding that he had legal pneumoconiosis. The administrative law judge, therefore, acted within his purview, as fact-finder, in crediting Dr. Cole's opinion for the reasons given. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark*, 12 BLR at 1-155.

Additionally, contrary to employer's argument, the administrative law judge properly accorded greater weight to the opinion of Dr. Cole because he was claimant's treating physician. The administrative law judge specifically discussed how Dr. Cole's opinion met the factors set forth at Section 718.104(d)(1)-(4) for considering a treating physician, *i.e.*, the nature of the doctor-patient relationship, the duration of the relationship, the frequency of the treatment, and the extent of the treatment.[5] The

[4] Dr. Cole, claimant's treating physician since 1988, diagnosed chronic obstructive pulmonary disease (COPD) and emphysema caused by coal dust exposure in a medical report of November 29, 2004. He testified on deposition that claimant was totally disabled from a pulmonary standpoint, and that both cigarette smoking and coal dust exposure substantially contributed to his condition. Decision and Order at 6-7; Dep. at 35.

[5] The administrative law judge specifically noted that Dr. Cole had repeatedly treated the miner for both his respiratory/pulmonary condition, as well as other ailments, that he had treated claimant for approximately six years, that his treatment records

administrative law judge properly concluded, therefore, based on these factors and the fact that Dr. Cole's opinion was supported by his underlying documentation, *see* 20 C.F.R. §718.104(d)(5), that Dr. Cole's opinion was entitled to great deference as claimant's treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 21 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Contrary to employer's contention, the administrative law judge was not required to accord lesser weight to the opinion of Dr. Cole because he was Board-certified in only Family Practice, while Drs. Repsher and O'Bryan were Board-certified pulmonologists. *See Clark*, 12 BLR at 1-154.

Further, in support of its argument that Dr. Cole's diagnosis of pneumoconiosis was not reliable because Dr. Cole is only a family practitioner, employer contends that Dr. Cole merely relied on information provided by a medical librarian to diagnose pneumoconiosis. Employer also contends that Dr. Cole's treatment records do not include a diagnosis of "black lung disease" until 2004, even though he had treated claimant since 1998. Contrary to employer's argument, however, Dr. Cole fully explained the basis for his diagnosis of pneumoconiosis, Employer's Exhibit 3, and the administrative law judge, within his purview, as fact-finder, properly credited Dr. Cole's testimony regarding the existence of pneumoconiosis. Specifically, Dr. Cole testified that he did his own research on pneumoconiosis by studying "the medical literature on current guidelines for diagnosing black lung disease." Dep. at 12. Dr. Cole testified that he found that "there are . . . situations where a person may actually have a degree of lung damage from black lung disease yet not have [the] characteristic x-ray findings." Dep. at 12. Dr. Cole noted that a diagnosis of pneumoconiosis could be based on the findings on physical examination coupled with symptoms, history and the results of a pulmonary function study, despite a negative x-ray. Moreover, Dr. Cole testified that he had reviewed claimant's x-rays and noted that while the linear fibrosis seen on claimant's November 2, 1998 x-ray "is not pathognomonic for coal miner's pneumoconiosis … it is . . . consistent with that diagnosis and can be seen in coal workers' pneumoconiosis." Dep. at 12. Further, Dr. Cole also explained that he did not diagnose pneumoconiosis until 2004 because until 2002, he had been unaware that claimant had been a coal miner and thereafter he had learned that coal mine employment and x-ray findings are leading factors in making a diagnosis of pneumoconiosis. Dep. at 9-13. Contrary to employer's argument, therefore, the administrative law judge properly credited Dr. Cole's diagnosis of pneumoconiosis. *See Anderson*, 12 BLR at 1-112.

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reflected that he had regularly seen claimant and had examined him on eleven occasions over a sixteen month period in 2003 and 2004, and that his treatment of claimant included a regimen of medications, x-rays, a pulmonary function study, and consultations with pulmonary specialists. Decision and Order at 13-14.

Additionally, we reject employer's argument that the administrative law judge erred in relying on the opinion of Dr. Houser because it was not part of the record and exceeded the evidentiary limitations contained at 20 C.F.R. §725.414. The administrative law judge did not, in violation of Section 725.414, rely on the opinion of Dr. Houser. Rather, in considering the opinion of Dr. Cole, the administrative law judge accurately observed that Dr. Cole, in the course of treating claimant, referred claimant to Dr. Houser, a pulmonary specialist, who diagnosed COPD secondary to smoking and coal dust exposure. Decision and Order at 7. Dr. Cole testified on deposition that referrals to specialists are a customary and routine part of his family practice. Dep. at 39, 42-44. Accordingly, the administrative law judge's argument is without merit, as Dr. Houser's opinion was obtained and considered by Dr. Cole in the course of treating claimant. *See* 20 C.F.R. §725.414(a)(4); *Dempsey v. Sewell Coal Co*., 23 BLR 1-47 (2004)(*en banc*).

Turning to the opinions of Drs. Repsher and O'Bryan, the administrative law judge, contrary to employer's contentions, permissibly accorded them little weight because: 1) Dr. Repsher's opinion[6], derived from statistics he found in a number of medical articles, and was based on generalities rather than the miner's specific case, *see Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); and 2) Dr. O'Bryan[7] offered no explanation for his opinion that claimant's respiratory condition was not partially the result of his thirty-four year history of coal mine employment, *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 1-107 (6th Cir. 2000); *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(*en banc*). In conclusion, therefore, the administrative law judge properly found that clinical and legal pneumoconiosis were established on the basis of Dr. Cole's opinion, 20 C.F.R. §718.202(a)(4).

[6] Dr. Repsher, based on a medical evidence review, opined in a report of November 16, 2004, and supplementary report of June 15, 2005, that claimant did not suffer from coal workers' pneumoconiosis or any other pulmonary or respiratory condition caused by or aggravated by coal dust exposure. Employer's Exhibit 4 at 2. He diagnosed COPD that was entirely attributable to smoking, and stated that the miner was totally disabled from a respiratory standpoint. Decision and Order at 7; Employer's Exhibit 2.

[7] Dr. O'Bryan examined the miner in May, 2005, and diagnosed COPD, primarily in the form of emphysema, due to smoking. He stated that claimant had a severe pulmonary impairment and could not return to coal mine employment, and that his condition was due to smoking. He also found that claimant did not have coal workers' pneumoconiosis. Decision and Order at 7; Employer's Exhibit 1.

We also reject employer's argument that the administrative law judge improperly invoked the presumption of disease causality found at Section 718.203(b),[8] based on the miner's thirty-four years of coal mine employment, to find that legal pneumoconiosis was established. This contention is without merit because the administrative law judge specifically addressed and credited the opinion of Dr. Cole diagnosing legal pneumoconiosis, *i.e.*, COPD arising out of coal mine employment and, therefore, necessarily made a finding that claimant had carried the burden of establishing that his legal pneumoconiosis arose out of coal mine employment. Decision and Order at 14; *see* 20 C.F.R. §718.201; *see generally Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006)(disease causality is subsumed in a finding of legal pneumoconiosis).

Finally, the administrative law judge credited Dr. Cole's finding of disability causation because he found pneumoconiosis established, *supra*, and accorded less weight to the contrary opinions of Drs. Repsher and O'Bryan, because they failed to diagnose, contrary to the administrative law judge's finding, pneumoconiosis. Regarding the opinion of Dr. Simpao diagnosing legal pneumoconiosis, the administrative law judge accorded it some probative weight to find disability causation established. The administrative law judge discredited Dr. Simpao's diagnosis of clinical pneumoconiosis but credited his diagnosis of legal pneumoconiosis which was based on his pulmonary evaluation of the miner in August 2002. The doctor stated that claimant was totally disabled from a respiratory standpoint, caused by coal mine employment, and opined that claimant's "severe pulmonary impairment was the result of this exposure." Decision and Order at 6; Director's Exhibit 12 at 42-43. He described the miner's smoking as an aggravating factor in his pulmonary impairment, but stated that coal dust exposure was the significant factor. Decision and Order at 6; Director's Exhibit 31. The administrative law judge criticized Dr. Simpao's opinion for failing to explain why smoking was not the exclusive cause of claimant's pulmonary impairment.

Employer contends generally that the administrative law judge erred in relying on the disability causation opinions of Dr. Cole and Dr. Simpao because they diagnosed claimant as suffering from pneumoconiosis in contrast to the opinions of Drs. Repsher and O'Bryan, who found claimant's impairment unrelated to his coal mine employment. The record shows that the administrative law judge determined the opinions of the former doctors to be more reliable than those of the latter for assessing the etiology of claimant's disability. Decision and Order at 15. The administrative law judge's analysis accords with the Sixth Circuit's teaching. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228,

[8] Section 718.203(b) provides a presumption that clinical pneumoconiosis arises out of coal mine employment if the miner has ten or more years of coal mine employment. 20 C.F.R. §718.203(b).

1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994) *rev'd on other grounds, Skukan v. Consolidation Coal Co.*, 46 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-63 (6th Cir. 1989), *accord*, *Scott v. Mason Coal Co.*, No. 99-1495 (4th Cir. May 2, 2002) slip op. at 9-10. Employer's Brief at 16-20. Employer's contention that there is insufficient evidentiary support for the administrative law judge's conclusion that the opinions of Drs. Cole and Simpao support a finding of disability causation must fail. The Sixth Circuit has held that such a determination would require the court to address the doctor's credibility which would exceed its limited scope of review. *See Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). The Sixth Circuit is emphatic that it is for the administrative law judge as factfinder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility manner'." *Id*. at 522, 22 BLR at 2-512 quoting *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002)(quoting *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983)). Accordingly, the administrative law judge's finding that disability causation was established at Section 718.204(c) is affirmed.

Because the administrative law judge's decision is rational, in accordance with law, and supported by substantial evidence, it is affirmed. *See Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 83 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). Employer's contentions are essentially a request to re-weigh the evidence, an exercise beyond our scope of review. *See Anderson*, 12 BLR at 1-112; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting.

I respectfully dissent from my colleagues' decision affirming the administrative law judge's Decision and Order awarding benefits. As employer contends, the administrative law judge's analysis of the evidence on the issues of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) is contradictory and unclear. Decision and Order at 12-13. I would, therefore, vacate the administrative law judge's Decision and Order awarding benefits and remand the case for the administrative law judge to clearly set forth his findings as to whether clinical and/or legal pneumoconiosis have been established under the correct standard. *See* 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 1-107 (6th Cir. 2000).

Further, as employer contends, it is unclear whether the administrative law judge found that all or only some of the medical opinions are "reasoned and documented." Decision and Order at 12. This finding affects the administrative law judge's credibility determinations. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc*, 12 BLR 1-111 (1989). Consequently, I would also remand the case for the administrative law judge to clarify his weighing of the medical opinion evidence. *See* 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); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

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ROY P. SMITH
Administrative Appeals Judge