BRB No. 09-0591 BLA

JAMES HALE BRIDGES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLFE RUN MINING COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 07/28/2010
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-6068) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent claim filed pursuant to 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] In a Decision and Order dated April 16, 2009, the administrative law judge found that the record supported a finding of sixteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted x-ray evidence was inconclusive as to the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing all the evidence together at 20 C.F.R. §718.202(a), the administrative law judge concluded that claimant satisfied his burden of proving that he has pneumoconiosis and of demonstrating a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing the claim on the merits, the administrative law judge indicated that he considered the more recent evidence, submitted in conjunction with claimant's subsequent claim, as being the most probative with regard to claimant's current respiratory condition. The administrative law judge further found that the evidence was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in failing to properly address the qualifications of the physicians and to explain his rationale for concluding that the x-ray evidence was inconclusive as to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also maintains that the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) is irrational and unsupported by substantial evidence. Employer specifically asserts that the administrative law judge erred in failing to explain the bases for his decision to credit Dr. Rasmussen's opinion, that claimant has bullous emphysema due, in part, to coal dust exposure (legal pneumoconiosis) over the contrary opinions of Drs. Castle and Hippensteel, that claimant does not have a coal dust-related respiratory condition. Employer also contends that the administrative law judge erred in relying on his findings under 20 C.F.R. §718.202(a)(4) to further conclude that claimant established total

[1] Claimant filed an initial claim on February 10, 1987, which was denied by the district director on August 7, 1987, because the evidence did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until he filed a subsequent claim on August 15, 2006. Director's Exhibit 2.

disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), based on Dr. Rasmussen's opinion. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not filed a response to employer's appeal, unless specifically required to do so by the Board.[2] Employer has filed a reply brief, reiterating its assertions that the administrative law judge erred with regard to his findings at 20 C.F.R. §§718.202(a)(4), 718.204(c).[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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[2] By Order dated March 30, 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. *Bridges v. Wolf Run Mining Co.*, BRB No. 09-0591 BLA (Mar. 30, 2010) (unpub. Order). Claimant and the Director, Office of Workers' Compensation Programs, have responded and assert that, while Section 1556 applies to this case, based on the filing date of the claim and the administrative law judge's finding of sixteen years of coal mine employment, it is not necessary to remand this case for consideration pursuant to Section 1556, if the Board affirms the award of benefits. Employer responds that while Section 1556 is applicable, retroactive application of Section 1556 to claims filed after January 1, 2005 is unconstitutional. Employer requests that, prior to applying Section 1556, the Board should hold the case in abeyance until legal challenges to the amendments are resolved. In the alternative, employer maintains that, if the Board remands the case for consideration of Section 1556 by the administrative law judge, the Board must direct the administrative law judge to reopen the record on remand to permit employer to submit evidence to satisfy the new burden of proof imposed on employer by the amendments.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determinations that claimant established sixteen years of coal mine employment, total disability under 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

I. Legal Pneumoconiosis

We first address employer's argument that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis.[5] Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Hippensteel and Castle. Dr. Rasmussen examined claimant on October 17, 2006, at the request of the Department of Labor, and recorded a coal mine history of seventeen to eighteen years, and a fifteen year smoking history of less than one-half pack of cigarettes a day from 1971 to 1986. Director's Exhibit 13. Dr. Rasmussen reported that claimant had x-ray evidence of coal workers' pneumoconiosis and bullous emphysema. He diagnosed coal workers' pneumoconiosis by x-ray, and chronic obstructive pulmonary disease (COPD)/emphysema based on the x-ray and objective studies, which he attributed to both coal dust exposure and cigarette smoking. *Id*. He opined that claimant suffered from a moderate loss of resting lung function with a significant ventilatory impairment on pulmonary function testing and marked reduction in his diffusion capacity. He further noted that claimant's resting arterial blood gas study met "the listings on CM-1159." *Id*. Dr. Rasmussen opined that claimant was totally disabled, and when asked on Form CM-988 to identify the extent to which each of the diagnosed conditions contributed to claimant's disability, Dr. Rasmussen wrote:

> [Claimant's] impairment in function can certainly be attributed to his coal mine dust exposure, which is known to cause chronic obstructive lung disease and all types of emphysema. Cigarette smoking also causes identical pathologic changes[,] including identical forms of emphysema.
>
> [Claimant] has clinical pneumoconiosis, which is a material contributing factor to his disabling chronic lung disease.

[5] 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 includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id*.

Id. In a deposition conducted on December 3, 2007, Dr. Rasmussen testified that claimant's chest x-ray revealed a significant "bullous change," which was "a consequence associated with emphysema of any cause." Employer's Exhibit 1 at 8-9. He explained that coal mine dust can cause identical forms of emphysema, including bullous emphysema, and stated that he based his opinion, in this case, that claimant's emphysema was due to coal dust exposure, on the medical literature, particularly an article by Dr. Francis Green, along with his own clinical observations. *Id*. at 11-12.

Dr. Hippensteel examined claimant on April 25, 2007, and reviewed the medical report of Dr. Rasmussen. Director's Exhibit 14. He noted that claimant worked in coal mine employment for sixteen years and smoked four to six cigarettes a day for six to eight years. *Id*. He concluded that claimant does not have clinical or legal pneumoconiosis. *Id*. Dr. Hippensteel opined that claimant developed "a purely obstructive impairment" as a result of his bullous emphysema, which was associated with diffusion and gas exchange impairment. *Id*. He stated that bullous emphysema is "usually a congenital problem that is aggravated by age," but may also be caused by complicated pneumoconiosis, but not simple pneumoconiosis. *Id*. Dr. Hippensteel opined that claimant is totally disabled from a pulmonary standpoint due to his bullous emphysema. *Id*.

In a report dated February 13, 2008, Dr. Castle stated that he reviewed the miner's treatment records, the results of chest x-rays, pulmonary function studies, and arterial blood gas tests, and the medical reports of Drs. Rasmussen and Hippensteel. Employer's Exhibit 2. According to Dr. Castle, claimant worked in coal mine employment for nineteen years and smoked cigarettes for eight to ten years. *Id*. Dr. Castle opined that claimant does not suffer from clinical or legal pneumoconiosis. *Id*. He noted that claimant's "physiologic studies demonstrated evidence of at least moderate airway obstruction associated with hyperinflation, gas trapping, and a reduction in diffusing capacity. These findings are absolutely typical of tobacco smoke induced or congenital bullous emphysema." *Id*. Dr. Castle opined that "the physiological abnormalities in this case are due to bullous emphysema and are not due to coal workers' pneumoconiosis." *Id*. Although he concluded that claimant was permanently and totally disabled, Dr. Castle opined that claimant's total disability was unrelated to his coal dust exposure. *Id*.

In weighing the conflicting medical opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted:

> All of the physicians who rendered an opinion in the instant case agree that [c]laimant has bullous emphysema. At issue is whether [c]laimant's bullous emphysema was caused by coal dust, or whether it is the result of his smoking history and possibly a congenital condition.

Decision and Order at 10. The administrative law judge gave "little weight" to the opinions of Drs. Hippensteel and Castle because he found that they "did not present any support" for their opinions that coal dust exposure does not cause bullous emphysema. *Id*. at 11. In contrast, the administrative law judge gave determinative weight to Dr. Rasmussen's opinion because he found that it was well-reasoned and well-documented, and specifically explained, with references to the medical literature, why claimant's coal dust exposure was a causative factor for his bullous emphysema. *Id*. In addition, the administrative law judge assigned significant weight to Dr. Rasmussen's opinion because "he is the most qualified physician offering an opinion in this record." *Id*. at 12. Accordingly, the administrative law judge found that claimant established the existence of legal pneumoconiosis, based on Dr. Rasmussen's opinion, pursuant to 20 C.F.R. §718.202(a)(4).

Employer maintains that the administrative law judge selectively analyzed the medical opinion evidence and erred in giving claimant a presumption that his COPD/ bullous emphysema was caused by his coal mine employment. Specifically, employer asserts that the administrative law judge did not properly consider the explanations given by Drs. Hippensteel and Castle, as to why bullous emphysema is not caused by coal dust exposure, and that he improperly discounted the respective qualifications of the physicians. Employer maintains that Dr. Rasmussen's opinion is speculative and legally insufficient to satisfy claimant's burden of proof. Employer also contends that the administrative law judge did not explain his credibility findings in accordance with the Administrative Procedure Act.[6] We reject all of employer's arguments as they are without merit.

Contrary to employer's assertion, the administrative law judge permissibly found, under the facts of this case, that the opinions of Drs. Hippensteel and Castle, that bullous

[6] The Administrative Procedure Act, 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), requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

emphysema is never caused by simple coal workers' pneumoconiosis, is contrary to the medical science relied upon by the Department of Labor (DOL) in promulgating 20 C.F.R. §718.202(a)(4), and the position of DOL that "*dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms*" and that coal mine dust exposure is associated with clinically significant airways obstruction. Decision and Order at 11, quoting 65 Fed. Reg. 79,943 (Dec. 20, 2000). We disagree with employer that the administrative law judge selectively analyzed the opinions of Drs. Hippensteel and Castle, or that he abused his discretion. An administrative law judge, as part of his deliberative process, may examine whether medical rationales are consistent with the conclusions contained in medical literature and scientific studies relied upon by DOL in drafting the definition of legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

Furthermore, contrary to employer's assertion, the administrative law judge also permissibly found that Drs. Hippensteel and Castle did not offer any documentary support for their opinions that claimant's emphysema was unrelated to coal dust exposure. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 11. As the administrative law judge noted, "Dr. Castle has merely made a vague reference to the 'medical literature,' and Dr. Hippensteel has simply stated that he 'disagrees' with Dr. Rasmussen's opinion regarding the mechanisms and causes of emphysema in miners." Decision and Order at 11.

Additionally, although Dr. Rasmussen testified that it was impossible to distinguish between the effects of coal dust exposure and smoking, he specifically attributed claimant's disabling respiratory condition to both coal dust exposure and smoking; therefore, we reject employer's contention that Dr. Rasmussen's opinion was speculative and insufficient to support claimant's burden of proof at 20 C.F.R. §718.204(c). *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004); *Trumbo v. Reading Anthracite Co.*, 17 BLR at 1-90 (1993); Employer's Brief in Support of Petition for Review at 15-17. We affirm the administrative law judge's finding that Dr. Rasmussen's opinion was well-documented and well-reasoned, as it was based on Dr. Rasmussen's examination of claimant, the objective medical evidence, claimant's exposure histories, subjective complaints, and Dr. Rasmussen's explanation, with citation to medical literature, that coal dust and smoking produce identical forms of emphysema. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-149; Decision and Order at 11.

Additionally, contrary to employer's assertion, the administrative law judge rationally determined that Dr. Rasmussen's opinion was entitled to significant weight based on his experience and qualifications. *See Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008); *Dillon v. Peabody Coal Co*., 11 BLR 1-113 (1988); Decision and Order at 12. The administrative law judge noted that "Dr. Rasmussen is Board-certified in internal medicine and specializes in pulmonary medicine." Decision and Order at 12. He found that "[w]hile Drs. Castle and Hippensteel also have excellent credentials, their experience with, and research in, the area of occupational pneumoconiosis does not match that of Dr. Rasmussen."[7] Decision and Order at 12; *see Dempsey*, 523 F.3d at 257, 24 BLR at 2-128; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151.

The administrative law judge, as trier-of-fact, has discretion to make credibility determinations, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Anderson*, 12 BLR at 1-111; *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988). We therefore reject employer's arguments and affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(4)[8] and his determination, based on a review of the evidence, overall, that claimant satisfied his burden to establish the existence of legal pneumoconiosis.[9]

[7] The administrative law judge noted that Dr. Rasmussen has the most significant background in the study and treatment of coal dust-induced lung disease. He noted that Dr. Rasmussen has served on committees and published articles studying black lung disease and has been an assistant professor of medicine at Marshall University School of Medicine. Decision and Order at 12. He further noted that Dr. Rasmussen's committee appointments include the Coal Mine Health Research Committee of NIOSH, that Dr. Rasmussen has been a consultant to NIOSH and that Dr. Rasmussen has testified before the Labor Subcommittee of the United States House of Representatives and the United States Senate. *Id*. The administrative law judge also referenced the fact that Dr. Rasmussen has published multiple articles on black lung disease. *Id*.

[8] In light of our affirmance of the administrative law judge's finding of legal pneumoconiosis, it is not necessary that we address employer's assertion that the administrative law judge erred in concluding that x-ray evidence was in equipoise, as to the existence of clinical pneumoconiosis, at 20 C.F.R. §718.202(a)(1).

[9] The administrative law judge permissibly accorded little weight to the medical opinion evidence dating from the prior claim, and relied on the more recent evidence of record that he found to be most probative of claimant's respiratory condition. *See Cooley*

II. Disability Causation

Pursuant to Section 718.204(c), employer argues that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis. We disagree. Because Drs. Hippensteel and Castle did not diagnose either clinical or legal pneumoconiosis, the administrative law judge properly found that their opinions were entitled to little, if any, weight on the issue of disability causation.[10] *See 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); *see also Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). Furthermore, insofar as the administrative law judge properly determined that Dr. Rasmussen provided a reasoned and documented opinion that claimant is totally disabled by bullous emphysema due, in part, to his coal dust exposure, we reject employer's assertion that the administrative law judge erred in finding that claimant satisfied his burden of proof.[11] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151; Decision and Order at 10-13. Thus, 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).[12]

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v. Island Creek Coal Co., 845 F.2d 624, 11 BLR 2-147 (6th Cir, 1988); Decision and Order at 12.

[10] The administrative law judge also noted that Dr. Hippensteel's opinion was "conclusory" and focused on whether claimant was totally disabled by clinical pneumoconiosis and did not address legal pneumoconiosis. Decision and Order at 13.

[11] The regulation at 20 C.F.R. §718.204(c) states that a miner shall be considered totally disabled due to pneumoconiosis, if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause if it has a material adverse effect on the miner's respiratory or pulmonary condition or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii); *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[12] In light of our affirmance of the award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge