

BRB No. 11-0697 BLA

EDWARD MOORE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KING COAL COMPANY)	DATE ISSUED: 07/26/2012
)	
and)	
)	
BITUMINOUS CASUALTY)	
CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits in Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in Subsequent Claim (2004-BLA-06448) of Administrative Law Judge Christine L. Kirby filed on May 29, 2003, 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). The administrative law judge accepted the parties' stipulation to thirteen years of coal mine employment and employer's concession that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Further, the administrative law judge found the newly submitted medical opinion evidence sufficient to establish the existence of clinical, but not legal, pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),¹ an element of entitlement previously adjudicated against claimant. The administrative law judge, therefore, found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d).

Reviewing the case on the merits, the administrative law judge found that clinical, but not legal, pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) based on the medical opinion evidence, and that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).² The administrative law judge, however, found that the evidence of record was insufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's decision to credit the opinion of Dr. Rosenberg over the opinion of Dr. Simpao, to find that disability causation was not established at Section 718.204(c). Specifically, claimant contends that Dr. Rosenberg's opinion conflicts "with statements in the preamble to the amended regulations[,] which indicate that [a] reduction in the FEV₁/FVC ratio is a marker of obstructive lung disease, including that caused by coal mine employment." Employer's Brief at 3. Employer responds, urging affirmance of the administrative law judge's

¹ The administrative law judge found that the x-ray evidence was insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Further, although the administrative law judge did not make findings pursuant to 20 C.F.R. §§718.202(a)(2) and (3), the record does not support a finding of pneumoconiosis thereunder.

² We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). We also affirm, as unchallenged on appeal, the administrative law judge's finding that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 16.

decision denying benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in response to the appeal.

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 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 pursuant to 20 C.F.R. Part 718 in a miner's claim, 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.

At the outset, we note that, although claimant expresses his argument on appeal as a challenge to the administrative law judge's disability causation finding pursuant to Section 718.204(c), his argument also challenges the administrative law judge's finding that legal pneumoconiosis was not established pursuant to Section 718.202(a)(4). Accordingly, we will address both issues.⁴

The medical opinion evidence relevant to the issues of legal pneumoconiosis and disability causation are the opinions of Drs. Simpao and Rosenberg. Dr. Simpao opined that, in addition to coal workers' pneumoconiosis, claimant has a mild degree of restrictive, and a severe degree of obstructive airways disease. Dr. Simpao further opined that claimant is totally disabled due to his pulmonary impairment. Dr. Simpao also opined that claimant's coal dust exposure is a significant contributing factor to his disease and disability. Dr. Simpao stated that, although claimant's "history of heart disease and smoking history are aggravating factors in his pulmonary status[,]" claimant's "totally disabling pulmonary impairment arose from coal dust exposure." Director's Exhibit 38; Decision and Order at 20.

³ Because claimant was last engaged in coal mine employment in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

⁴ Although the administrative law judge found that clinical pneumoconiosis was established, she conflates her discussion of the issues of clinical pneumoconiosis and legal pneumoconiosis in determining that disability causation was not established pursuant to 20 C.F.R. §718.204(c). *See* Decision and Order at 19-21.

Dr. Rosenberg opined that, in addition to a mild degree of clinical coal workers' pneumoconiosis, claimant has a severe obstruction that is disabling. He stated that claimant's severe reduction in both the FEV₁ and FEV₁/FVC ratio is consistent with the presence of a smoking-related obstruction. Additionally, he advised that claimant's elevated carboxyhemoglobin level indicates "continued smoking or exposure to smoke" despite claimant's statement to the contrary. *See* Decision and Order at 21. Dr. Rosenberg concluded that, while claimant is disabled from a pulmonary standpoint, the disability is not related, in whole or in part, to past coal mine dust exposure, but is instead related to his smoking history. Employer's Exhibits 7 and 8; Decision and Order at 12.

In evaluating the opinions of Drs. Simpao and Rosenberg, the administrative law judge acknowledged "that the portion of Dr. Rosenberg's explanation explaining that [c]laimant does not have legal pneumoconiosis based on his reduced FEV₁/FVC ratio⁵ is inconsistent with the Department of Labor's position as set forth in the preamble to the amended regulations." Decision and Order at 21. However, the administrative law judge found that other portions of Dr. Rosenberg's opinion, attributing claimant's disabling respiratory impairment to smoking alone, were "not inconsistent with the regulations and [were] well-reasoned and documented." Decision and Order at 20. Specifically, the administrative law judge found Dr. Rosenberg's opinion credible because the doctor noted that the fact that "claimant's post-bronchodilator ventilatory testing demonstrated reversibility ... militates against finding the presence of coal-dust induced obstructive lung disease, which is irreversible." Decision and Order at 21. Additionally, the administrative law judge credited Dr. Rosenberg's opinion because he "observed that [c]laimant's carboxyhemoglobin level was elevated, thus indicating continued smoking or exposure to smoke." Decision and Order at 21. Further, the administrative law judge found Dr. Rosenberg's opinion more credible, than Dr. Simpao's, as "Dr. Rosenberg considered a variety of tests and physical examination findings as compared to the limited medical data relied upon by Dr. Simpao." Decision and Order at 21.

Regarding the opinion of Dr. Simpao, the administrative law judge found that because Dr. Simpao "did not diagnose or discuss legal pneumoconiosis, ... his medical opinion [was] insufficient to support a finding of the presence of legal pneumoconiosis." Decision and Order at 5. Further, the administrative law judge found that "the probative value of Dr. Simpao's opinion[,] attributing claimant's disease and disability to coal mine employment was compromised, as Dr. Simpao "relied in part on [c]laimant's discontinued exposure to smoking," when Dr. Rosenberg explained how medical testing

⁵ The pulmonary function study, relied upon by Dr. Rosenberg, resulted, after the administration of a bronchodilator, FEV₁ of 1.4 and an FVC of 3.75, a ratio of 37%, well within the "less than 55%" required to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i), Appendix (C).

indicated continued smoking. *See* Decision and Order at 21. The administrative law judge, therefore, concluded that the opinion of Dr. Rosenberg was more probative on the issues of legal pneumoconiosis and disability causation than the opinion of Dr. Simpao and, therefore, found that the medical opinion evidence failed to establish the existence of legal pneumoconiosis and disability causation.

First, regarding the issue of legal pneumoconiosis, we note that, contrary to the administrative law judge's finding, Dr. Simpao addressed the issue when he opined that claimant's "coal dust exposure is the significant factor in his pulmonary impairment and disease." *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 20. Accordingly, we vacate the administrative law judge's finding that the existence of legal pneumoconiosis was not established pursuant to Section 718.202(a)(4) and we remand the case for the administrative law judge to reconsider the medical opinion evidence relevant to the issue of legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Regarding Dr. Rosenberg's opinion, the administrative law judge discredited that portion of Dr. Rosenberg's opinion, in which Dr. Rosenberg opined that claimant's reduced FEV₁/FVC ratio evidenced only a smoking-induced respiratory impairment, as it was inconsistent with the preamble and amended regulations. Decision and Order at 21. The administrative law judge, however, failed to provide sufficient explanation for her finding that Dr. Rosenberg's opinion, that claimant did not have legal pneumoconiosis, was more credible than Dr. Simpao's, because Dr. Rosenberg found that the "reversibility" exhibited on claimant's post-bronchodilator pulmonary function study militated against a finding that claimant's respiratory impairment was due to coal mine employment. *See* 65 Fed. Reg. 79,938-43 (Dec. 20, 2000); 20 C.F.R. §718.201; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *see Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Roberts & Schaeffer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005). On remand, therefore, the administrative law judge must reconsider Dr. Rosenberg's opinion. Additionally, in weighing the opinions on remand, the administrative law judge must consider the credibility of the opinions of Drs. Simpao and Rosenberg on the issues of legal pneumoconiosis and disability causation, in light of statements made by claimant as to when he stopped smoking. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1986)(en banc).

Finally, because the administrative law judge's findings regarding the issue of legal pneumoconiosis are relevant to the issue of disability causation, the administrative law judge must reconsider the issue of disability causation in light of those findings. If the administrative law judge finds that legal pneumoconiosis is established, she must then consider whether claimant's total disability is due to legal pneumoconiosis pursuant to

Section 718.204(c). Alternatively, the administrative law judge must determine whether claimant's total disability is due to clinical pneumoconiosis. *See Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Subsequent Claim is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge