BRB No. 11-0751 BLA

ODVERT F. CARTER, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TEDS COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 07/27/2012
	)	
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 on Remand of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (05-BLA-6321) of Administrative Law Judge William S. Colwell awarding benefits on a

subsequent claim filed on March 2, 2004,[1] 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). In his first Decision and Order on this claim, the administrative law judge found that claimant established six years and four months of coal mine employment, but failed to establish an element of entitlement previously adjudicated against him pursuant to 20 C.F.R. §725.309(d). The administrative law judge therefore denied benefits on the claim. Claimant appealed. Responding to claimant's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding and his finding that clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1),[2] but vacated the administrative law judge's findings that legal pneumoconiosis, total respiratory disability, disability causation, and a change in an applicable condition of entitlement were not established pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), and 725.309(d). The Board therefore instructed the administrative law judge to reconsider these issues on remand. *Carter v. Teds Coal Co.*, BRB No. 09-0434 BLA (Jan. 28, 2010)(unpub.).

On remand, the administrative law judge credited the opinion of Dr. Simpao over the contrary opinions of Drs. Repsher and Selby, and found that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge therefore found that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d). Weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant established the existence of pneumoconiosis. The administrative law judge also found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Further, the administrative law judge found that claimant established disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting Dr. Simpao's opinion, over the contrary opinions of Drs. Selby and Repsher, to find the existence of legal pneumoconiosis, a change in an applicable condition of entitlement and pneumoconiosis overall established. Employer also argues that the administrative law

[1] This is claimant's third claim for benefits. Claimant's previous claims, filed on March 3, 1989 and September 28, 1992, were denied by the district director for failure to establish any element of entitlement. Director's Exhibits 1, 2.

[2] The Board also affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3).

judge erred in finding disability causation established.[3] Claimant has not responded to employer's appeal. 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.[4] 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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 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 failed to establish any element of entitlement. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(d)(2), (3).

After consideration of the arguments on appeal, the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order must be affirmed as it is rational, supported by substantial evidence, and in accordance with law.

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[3] The administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) is affirmed, as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Legal Pneumoconiosis - 20 C.F.R. §718.202(a)(4)

The opinions of Drs. Simpao, Selby and Repsher are relevant to the issue of legal pneumoconiosis. All of these physicians diagnosed the existence of an obstructive respiratory disease. Dr. Simpao opined that claimant's history of both coal dust exposure and smoking contributed to the disease, while Drs. Selby and Repsher attributed the disease to claimant's history of smoking alone.

In evaluating the opinions, the administrative law judge credited Dr. Simpao's opinion, that claimant's obstructive lung disease is due to both smoking and coal dust exposure, as it was consistent with the regulations and the position of the Department of Labor (DOL), as stated in the preamble to the amended regulations, that coal dust exposure is a cause of obstructive lung disease.

Contrary to employer's argument, a physician is not required to distinguish what portion of claimant's respiratory impairment is due to coal dust exposure and what is due to smoking in order to establish the existence of legal pneumoconiosis. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Rather, a physician's opinion need only establish that claimant's lung disease is "significantly related to, or substantially aggravated by coal mine dust exposure." *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *accord Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001).

Further, contrary to employer's assertion, the administrative law judge did not err in crediting Dr. Simpao's opinion, that claimant's respiratory impairment is due to both coal mine employment and smoking, because Dr. Simpao found that claimant had only three years of coal mine employment. Employer's Brief at 19. As the Board stated in its prior Decision and Order:

> Dr. Simpao relied upon a three year coal mine employment history, a history even less than the six years and four months credited by the administrative law judge. As the Director accurately notes, if Dr. Simpao's opinion had been based upon a significantly greater length of coal mine employment than that credited by the administrative law judge, the administrative law judge could have permissibly questioned the credibility of his opinion. *See Worhach v. Director*, 17 BLR 1-105, 1-110 fn. 9 (1993); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984). However, the administrative law judge's coal mine employment finding of six years and four months of coal mine employment does not call into question Dr. Simpao's opinion that an even lesser degree of coal dust exposure contributed to his obstructive airway disease.

Carter, BRB No. 09-0434 BLR, slip. op. at 7. This holding constitutes the law of the case and employer's argument will not be addressed again. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Consequently, we affirm the administrative law judge's finding that Dr. Simpao's opinion, attributing claimant's obstructive lung disease to both smoking and coal dust exposure, was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Next, contrary to employer's contentions, the administrative law judge properly accorded less weight to the opinions of Drs. Selby and Repsher. Counter to employer's argument, the administrative law judge properly accorded less weight to the opinion of Dr. Selby because the doctor relied on the reversibility of claimant's pulmonary function study values after the administration of a bronchodilator as a basis to reject coal mine employment as a cause of respiratory impairment.[5] *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Roberts v. Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

Additionally, contrary to employer's assertion, the administrative law judge did not err in discrediting the opinion of Dr. Selby because he opined that claimant's coal mine employment was, in fact, "protective" of claimant's lungs. Dr. Selby so opined because claimant did not smoke during the time that he was in the coal mines. Employer asserts that the administrative law judge's finding that such an opinion was "a subjective personal opinion about pneumoconiosis" was improper. The administrative law judge found:

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[5] Specifically, the administrative law judge found that Dr. Selby stated that he:

> Declined to diagnose coal dust induced obstructive disease on grounds that the miner's ventilatory results demonstrated reversibility after use of a bronchodilator. [Instead,] [h]e asserted that coal dust-induced lung disease produces a 'fixed problem' and variability 'according to different triggers is almost always related to asthma' and is unrelated to coal dust exposure. Dr. Selby does not, however, explain the irreversible and totally disabling component of the ventilatory testing he conducted.

Decision and Order at 18.

> A similar view by Dr. Selby was addressed in *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 902 [sic] (7th Cir. 2005), wherein the circuit court determined that it was proper to accord less weight to a medical opinion that is 'influenced by the physician's subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.' In particular, the court agreed that Dr. Selby's view that coal mine employment had 'preserved' the miner's lung function and had a 'positive effect' on his health was contrary to the Act and its implementing regulations. To the extent that Dr. Selby's opinion in the present claim is guided by similar premises, the probative value of the opinion is compromised.

Decision and Order at 19-20. Thus, the administrative law judge acted within his discretion in finding that Dr. Selby's opinion was compromised because it is contrary to the Act and implementing regulations. *See Williams*, 400 F.3d at 999, 23 BLR at 2-318.

Turning to Dr. Repsher's opinion, employer contends that the administrative law judge erred in discrediting it because it is inconsistent with the preamble to the amended regulations, which provides that coal dust exposure can produce a disabling lung disease even in the absence of a finding of clinical pneumoconiosis.[6] As the administrative law judge noted, "Dr. Repsher premised his opinion on a view that Category 0 to Category 3 simple coal workers' pneumoconiosis does not result in clinically significant chronic obstructive pulmonary disease," and "citing to certain medical literature, the doctor posits that 13 percent of 'chronic smokers will develop potentially catastrophic COPD."' Decision and Order at 16-17. The administrative law judge properly found that, to the extent that Dr. Repsher's opinion is based on views that are inconsistent with the DOL's position, the doctor's opinion regarding the existence of legal pneumoconiosis was compromised. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-369 (7th Cir. 2008). Further, the administrative law judge correctly observed that "Dr. Repsher noted that, while coal dust exposure may cause clinically significant airways obstruction, it is unlikely in this specific miner based on statistical data demonstrating that the disease is more likely caused by a history of tobacco abuse." Decision and Order at 17. A similar opinion was properly accorded less weight in *Beeler*, 521 F.3d at 726, 24 BLR at 2-381, on the ground

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> [6] Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present.

65 Fed. Reg. 79,943 (Dec. 20, 2000); *see* Decision and Order at 16, 17.

that the physician's opinion was based more on generalities than the specific medical data pertaining to a particular miner. Thus, the administrative law judge's accordance of less weight to Dr. Repsher's opinion on this basis was also rational.

Finally, the administrative law judge properly accorded less weight to the opinion of Dr. Repsher because "he relied on a 100 pack year smoking history, but only 26.3 pack years have been established on this record." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 16.

In conclusion therefore we affirm the administrative law judge's weighing of the new medical opinion evidence on the issue of legal pneumoconiosis and his finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). We therefore affirm his finding that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d). Additionally, we affirm the administrative law judge's finding that the existence of pneumoconiosis was established, after consideration of all the relevant evidence, pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Disability Causation - 20 C.F.R. §718.204(c)

Next, contrary to employer's contention, the administrative law judge properly discredited the opinions of Drs. Selby and Repsher on the issue of disability causation pursuant to Section 718.204(c), because they did not, contrary to his own finding, diagnose the existence of legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Instead, the administrative law judge properly credited the opinion of Dr. Simpao, who found the existence of legal pneumoconiosis, as it was based on claimant's "smoking and work histories, physical examination findings, testing, symptoms and complaints of the miner, and various testing." Decision and Order at 29; *see Clark*, 12 BLR at 1-155. Further, the administrative law judge properly credited the opinion of Dr. Simpao, that claimant's disability was due to legal pneumoconiosis, as it was, unlike the opinions of Drs. Selby and Repsher, consistent with the position of the DOL regarding legal pneumoconiosis, as previously discussed. We therefore affirm the administrative law judge's finding of disability causation at Section 718.204(c) as it is rational, supported by substantial evidence, and in accordance with law.

Lastly, contrary to employer's argument, the administrative law judge has properly discussed the record evidence, and reached conclusions of law and findings of fact that were within his discretion. We therefore consider his opinion to be in compliance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act

by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, we affirm the administrative law judge's findings on the issues of pneumoconiosis and disability causation. We therefore affirm the administrative law judge's decision awarding benefits.

Accordingly, the administrative law judge's Decision and Order on Remand 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