BRB No. 12-0573 BLA

JIMMY COX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 07/26/2013
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2009-BLA-05616) of Administrative Law Judge Daniel F. Solomon on a subsequent claim[1] filed on June 13, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge accepted the parties'

[1] Claimant's first claim for benefits, filed on January 13, 2000, was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant did not appeal the denial or further pursue the claim.

stipulation to ten years of underground coal mine employment[2] and found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d), as the new evidence established the existence of legal pneumoconiosis[3] and total respiratory disability, elements of entitlement previously adjudicated against claimant. Considering the claim on the merits, the administrative law judge found the existence of legal pneumoconiosis, a totally disabling respiratory impairment, and disability causation established pursuant to 20 C.F.R. §§718.202(a), 718.204(b), and 718.204(c). Accordingly, the administrative law judge awarded benefits on the subsequent claim.

On appeal, employer contends that the administrative law judge did not apply the proper standard in finding that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d). Employer also contends that the administrative law judge erred in finding that the existence of legal pneumoconiosis and disability causation were established pursuant to Sections 718.202(a)(4) and 718.204(c).[4] In addition, employer contends that the administrative law judge failed to adequately explain his findings pursuant to the Administrative Procedure Act (APA), 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). In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in response to employer's 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30

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[2] The 2010 amendments to the Black Lung Benefits Act do not apply to the instant case, as claimant does not allege that he had at least fifteen years of qualifying coal mine employment. 30 U.S.C. §921(c)(4).

[3] The administrative law judge found that the existence of clinical pneumoconiosis was not established. Decision and Order at 6-7.

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

[5] Because claimant's last coal mine employment was 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, 1-202 (1989)(en banc); Director's Exhibit 4.

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. When 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. Director's Exhibit 1 at 1-3. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing an element of entitlement. 20 C.F.R. §725.309(d)(2), (3).

20 C.F.R. §725.309

Employer contends that the administrative law judge erred in finding that a change in an applicable condition of entitlement was established because the administrative law judge failed to compare the new evidence with the old evidence pursuant to Section 725.309(d). Contrary to employer's contention, however, the administrative law judge is not required to compare the old and new evidence. Rather, the administrative law judge is required only to determine whether the new evidence establishes the existence of one of the elements of entitlement previously adjudicated against claimant. *See* 20 C.F.R. §725.309(d); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *White*, 23 BLR at 1-3. In this case, the administrative law judge found that a change in an applicable condition of entitlement was established as the new medical evidence established the existence of pneumoconiosis and a total respiratory disability, elements of entitlement previously adjudicated against claimant. Accordingly, we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309.

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

Employer asserts that the administrative law judge erred in finding the existence of legal pneumoconiosis established by crediting the opinion of Dr. Houser over that of Dr.

Jarboe.[6] Dr. Houser attributed claimant's chronic obstructive pulmonary disease (COPD) to both his smoking and his coal mine dust exposure, while Dr. Jarboe found that it was unrelated to his coal mine dust exposure.[7] The administrative law judge accorded greater weight to Dr. Houser's opinion because it was well-reasoned and was "more consistent with the regulations." Decision and Order at 9. The administrative law judge accorded less weight to the opinion of Dr. Jarboe, that claimant's COPD was unrelated to his coal mine dust exposure because Dr. Jarboe's opinion, that he could distinguish between the effects of smoking and mining, was not in keeping with Department of Labor regulations discussing the interrelatedness of smoking and coal mine dust exposure on the development of COPD. The administrative law judge also accorded less weight to the opinion of Dr. Jarboe, who found the existence of asthma, because Dr. Jarboe did not address and consider whether claimant's asthma could have been "substantially aggravated" by coal mine dust exposure. The administrative law judge concluded, therefore, that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a)(4), based on the better reasoned opinion of Dr. Houser.

The definition of legal pneumoconiosis includes any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The United States Court of Appeals for the Sixth Circuit has held that "legal pneumoconiosis" is established if claimant's "coal mine employment contributed 'at least in part' to his [respiratory impairment]." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000), *quoting Southard v. Director, OWCP*, 732 F.2d 66, 71 (6th Cir.1984). The Sixth Circuit has also held that determining the credibility and probative value of a doctor's opinion falls within the administrative law judge's discretion in his role as fact-finder and that the reviewing authority must defer to the administrative law judge's assessment, unless it is plainly irrational. *See Jericol Mining, Inc. v. Napier,* 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*],

[6] Contrary to employer's contention, the administrative law judge properly discounted Dr. Repsher's opinion, that claimant does not have a respiratory impairment arising out of coal mine employment, because Dr. Repsher was the only physician of record who found that claimant is not totally disabled and because he was unaware of claimant's most recent testing. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

[7] Dr. Houser examined claimant on May 13, 2009. He took a work and medical history and conducted an x-ray, a pulmonary function study and a blood gas study. Claimant's Exhibit 1. Dr. Jarboe reviewed claimant's medical records. Claimant's Exhibit 3.

298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Employer contends that the administrative law judge did not sufficiently explain his basis for crediting the opinion of Dr. Houser, in keeping with the requirements of the APA. We disagree. The administrative law judge reviewed the relevant medical opinions and, within his discretion as fact-finder, properly found that the opinion of Dr. Houser established that claimant's coal mine dust exposure contributed, in part, to claimant's COPD. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Contrary to employer's argument, the administrative law judge rationally concluded that Dr. Houser's opinion was better reasoned than that of Dr. Jarboe, given claimant's smoking and coal dust exposure, claimant's objective testing, and the fact that Dr. Houser's opinion was more consistent with the regulations.

The administrative law judge rationally accorded less weight to the opinion of Dr. Jarboe because his opinion, that he could distinguish between the effects of smoking and coal mine dust exposure, was not in keeping with the regulations, which state that "smokers who mine have an additive risk for developing significant obstruction." 65 Fed. Reg. 79,940 (Dec. 20, 2000). Similarly, the administrative law judge rationally accorded less weight to the opinion of Dr. Jarboe, diagnosing the existence of asthma, because Dr. Jarboe did not address whether claimant's asthma was "substantially aggravated" by his coal mine dust exposure. 20 C.F.R. §718.201(b). Consequently, because the administrative law judge fully discussed the relevant evidence and the reasons for his credibility findings, we affirm the administrative law judge's decision to give greater weight to the opinion of Dr. Houser. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. Accordingly, we affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established at Section 718.202(a)(4), based on the opinion of Dr. Houser.[8]

[8] Although the administrative law judge also found that claimant relied on the opinions of Drs. Baker, Chavda and Popescu, the administrative law judge accorded little weight to the opinion of Dr. Baker because he relied on an "inaccurate mining history [of eighteen years]," and little weight to the opinion of Dr. Popescu because it was equivocal. The administrative law judge noted that "Dr. Chavda's report was not designated." Decision and Order at 7-8. We need not consider the administrative law judge's findings regarding these opinions as the administrative law judge found that the existence of legal pneumoconiosis was established on the basis of Dr. Houser's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

20 C.F.R. §718.204(c)
Total Disability due to Pneumoconiosis

Employer asserts that the administrative law judge erred in finding that the medical opinion evidence established that claimant's disability was due to his legal pneumoconiosis. Specifically, employer contends that the administrative law judge erred in crediting the opinion of Dr. Houser, attributing claimant's disability to legal pneumoconiosis, and rejecting the contrary opinions of Drs. Jarboe and Repsher on the issue.[9] Contrary to employer's contention, however, the administrative law judge properly rejected the opinions of Drs. Jarboe and Repsher because they did not find, as Dr. Houser did, that claimant has legal pneumoconiosis. *See Skukan v. Consolidation Coal Co*., 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom*., *Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co*., 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); Decision and Order at 10. Consequently, the administrative law judge provided a valid basis for rejecting the opinions of Drs. Jarboe and Repsher on the issue of disability causation. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Therefore, we affirm the administrative law judge's finding that disability causation was established pursuant to Section 718.204(c).

[9] Dr. Houser attributed claimant's disability to both smoking and coal mine dust exposure. Claimant's Exhibit 1. Dr. Repsher opined, unlike the other physicians, that claimant did not have a "totally disabling respiratory impairment." Employer's Exhibit 6. Dr. Jarboe opined that it was not "probable" that claimant's "[ten] years of coal dust inhalation would cause … [the] disabling ventilatory impairment seen in [claimant]." Decision and Order at 8; Employer's Exhibit 3.

Accordingly, the administrative law judge's Decision and Order Award of 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