BRB No. 13-0556 BLA

LARRY DALE MATTAS Claimant-Respondent v. APOGEE COAL COMPANY, LLC and ARCH COAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	DATE ISSUED: 07/17/2014 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-06012) of Administrative Law Judge Adele Higgins Odegard with respect to a claim filed on November 23, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge found that claimant established thirty years of surface coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge determined that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (a)(4), but established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant proved that he is totally disabled at 20 C.F.R. §718.204(b)(2)(i)-(ii), (iv) and established that his total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues, in its brief and reply brief, that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a), 718.204(c), as she inappropriately relied on the preamble to the 2000 regulatory revisions, she erroneously shifted the burden of proof to employer, and failed to consider all relevant evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited brief, indicating that Board should reject employer's argument that the administrative law judge's reliance on the preamble was improper.[2]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in

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[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The administrative law judge determined that amended Section 411(c)(4) does not apply in this case, as claimant did not establish at least fifteen years of qualifying coal mine employment. Decision and Order at 9.

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

The administrative law judge considered the medical opinions of Drs. Rasmussen, Zaldivar, and Rosenberg at 20 C.F.R. §§718.202(a)(4),[4] 718.204(c), and noted that she gave their opinions equal weight based on their qualifications. Decision and Order at 27. The administrative law judge gave substantial weight to Dr. Rasmussen's opinion, that claimant's chronic obstructive pulmonary disease (COPD) and emphysema are due to coal dust exposure and cigarette smoking, as she found that it was based on the objective medical evidence and was consistent "with the Department's position that miners who smoke are at an 'additive risk for developing significant obstruction.'" *Id*. at 29, *quoting* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The administrative law judge found that Dr. Rasmussen's statement, that coal dust and cigarette smoking are "presumed" causes of claimant's respiratory impairment, did not render his opinion speculative or conclusory, as Dr. Rasmussen sufficiently explained the basis for his diagnoses. *Id*. at 28-29, *quoting* Director's Exhibit 14.

In contrast, the administrative law judge gave less weight to the opinions of Drs. Zaldivar and Rosenberg, that claimant did not have legal pneumoconiosis, as she found that they did not adequately explain why coal dust exposure could not have also contributed to claimant's respiratory impairment. Decision and Order at 29-30. In addition, the administrative law judge gave less weight to Dr. Rosenberg's opinion because she determined it was contrary to the medical literature credited by the Department of Labor (DOL) in the preamble to the 2001 revised regulations. *Id*. at 30.

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[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. 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).

[4] The administrative law judge determined that there was no biopsy evidence in the record for consideration at 20 C.F.R. §718.202(a)(2), and that there were no applicable presumptions at 20 C.F.R. §718.202(a)(3). Decision and Order at 19.

The administrative law judge then relied on her weighing of the medical opinions at 20 C.F.R. §718.202(a)(4) to determine that claimant established total disability causation at 20 C.F.R. §718.204(c). *Id*. at 32.

Employer argues that the administrative law judge erred in giving "binding effect" to the preamble when weighing the medical opinion evidence. Employer's Brief in Support of Petition for Review at 10. Employer states that Dr. Rasmussen's opinion is similar to the opinions that the United States Court of Appeals for the Fourth Circuit rejected in *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999) and *Southern Appalachian Coal Co. v. Holliday*, 181 F.3d 91 (Table), 1999 WL 410123 (4th Cir. June 21, 1999), as Dr. Rasmussen acknowledged that cigarette smoking alone could have caused claimant's impairment, and did not definitively state that coal dust inhalation contributed to claimant's respiratory impairment. *Id*. at 15. Employer also maintains that, in weighing the evidence, the administrative law judge shifted the burden of proof by accepting Dr. Rasmussen's opinion "at face value," and "dissect[ing]" the opinions of Drs. Zaldivar and Rosenberg, based on the erroneous finding that they relied on premises in conflict with the preamble. *Id*. at 16.

Contrary to employer's assertion, the administrative law judge did not give "binding effect" to the preamble, or accept Dr. Rasmussen's opinion at "face value." Rather, the administrative law judge acted within her discretion in consulting the preamble as an authoritative statement of the medical principles accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). Moreover, the administrative law judge rationally gave more weight to Dr. Rasmussen's opinion, that claimant's respiratory impairment is due to coal dust exposure and cigarette smoking, as she found that it was consistent with the objective medical evidence, supported by medical literature, and consistent with the comments by the DOL in the preamble to the regulations, that "miners who smoke are at an 'additive risk for developing significant obstruction.'" Decision and Order at 29, *quoting* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998). In addition, although Dr. Rasmussen indicated that cigarette smoking or coal dust exposure alone could have caused claimant's impairment, he stated unequivocally: "[i]n any event, it is clear that one must conclude that his coal mine dust exposure is a significant co-contributor." Director's Exhibit 14. We affirm, therefore, the administrative law judge's crediting of Dr. Rasmussen's opinion at 20 C.F.R. §718.202(a)(4).

We also reject employer's contentions that the administrative law judge improperly shifted the burden of proof to employer to rule out a possible contribution from coal dust exposure in claimant's respiratory impairment, and that she mischaracterized the opinions of Drs. Rosenberg and Zaldivar. Rather, the administrative law judge acted within her discretion in giving less weight to Dr. Rosenberg's opinion, that claimant's reduced FEV1/FVC ratio indicated that claimant's impairment is not due to coal dust exposure, as she rationally found it was inconsistent with DOL's acknowledgement in the preamble that coal dust exposure can also cause a significant decrease in the FEV1/FVC ratio.[5] *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-130; 65 Fed. Reg. 79,943 (Dec. 20, 2000). In addition, contrary to employer's contention, the fact that Dr. Rosenberg cited more recent medical literature did not require the administrative law judge to conclude that advancements in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs that was endorsed by the DOL in the preamble.[6] *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (observing that neither of the employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble"). The administrative law judge also permissibly discredited Dr. Zaldivar's opinion, as she found that Dr. Zaldivar did not adequately explain how he eliminated coal dust as a contributing cause of claimant's pulmonary impairment, particularly in light of his acknowledgment that the effects of coal dust inhalation and smoking are additive, and that centrilobular emphysema may be related to coal dust inhalation. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 29; Employer's Exhibit 5 at 28, 37. Consequently, we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a). As the administrative law judge applied her credibility determinations at 20 C.F.R. §718.202(a), to also find that claimant established total disability due to pneumoconiosis, we affirm the administrative law judge's finding that claimant satisfied his burden of proof at 20 C.F.R. §718.204(c).

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[5] To support his opinion, Dr. Rosenberg cited a study by Attfield and Hodous entitled "Pulmonary Function of U.S. Coal Miners Related to Dust Exposure Estimates" Am Rev Respir Dis 145:605-609 (1992). Employer's Exhibit 6 at 14. However this study indicated that "[t]he various models of exposure show consistent declines in FEV1, FVC and FEV1/FVC with increasing dust exposure." *Id*.

[6] Because the administrative law judge provided a valid reason for giving less weight to Dr. Rosenberg's opinion, it is not necessary to address employer's additional arguments concerning the administrative law judge's weighing of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge