BRB No. 08-0633 BLA

H.G. Claimant-Respondent v. BLACK WARRIOR MINERALS, INCORPORATED and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/30/2009 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Anthony K. Finaldi (Ferreri & Fogle, PLLC), Louisville, Kentucky, for employer.

Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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-05451) of Administrative Law Judge Robert D. Kaplan on a claim filed on June 23, 2006 pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge accepted employer's concession that it is the responsible operator and found that the parties' stipulations to twenty-four years of coal mine employment, and that claimant is totally disabled due to a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), are supported by the evidence of record. The administrative law judge also found that the x-ray evidence under 20 C.F.R. §718.202(a)(1) is negative for pneumoconiosis, but that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further determined that the presumption that claimant's pneumoconiosis arose out of coal mine employment, set forth in 20 C.F.R. §718.203(b), was not rebutted and that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits and found that claimant's spouse qualifies as a dependent for purposes of augmentation of benefits.

On appeal, employer contends that the administrative law judge erred in finding the existence of legal pneumoconiosis arising out of coal mine employment at Sections 718.202(a)(4), 718.203(b) and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in finding the existence of pneumoconiosis. The Director also notes that the administrative law judge did not determine the date from which benefits commence.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination of twenty-four years of coal mine employment, and his findings that employer is the responsible operator, that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and that claimant's spouse is a dependent for purposes of augmentation of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 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, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Young, Hawkins and Boswell. The administrative law judge found that Dr. Young's report, dated August 29, 2006, concluded that claimant was totally disabled due to his chronic obstructive pulmonary disease (COPD), which was caused by smoking. Decision and Order at 7; Director's Exhibit 9. The administrative law judge also considered Dr. Young's December 13, 2007 deposition statement, that it was unlikely that claimant's COPD was in any significant way caused by his coal mine employment because the x-ray revealed no radiographic changes attributable to coal dust exposure, and noted that Dr. Young "conceded that such a conclusion is 'somewhat controversial.'" Decision and Order at 7, *quoting* Employer's Exhibit 4. The administrative law judge further noted that Dr. Young acknowledged that he is not a B reader and that his finding of emphysema on the x-ray "differed from the reading of the expert radiologist [Dr. Nash]," stating:

> I don't consider myself an expert in coal workers' pneumoconiosis. I'm an expert in pulmonary disease. The experts whose work I have read acknowledged that one can have COPD secondary to coal dust exposure in the absence of radiographic changes.

Decision and Order at 7, *quoting* Employer's Exhibit 4 at 19-20. The administrative law judge explained that he gave no weight to Dr. Young's opinion because:

> First, Dr. Young acknowledged that his opinion is not accepted by "experts in coal workers' pneumoconiosis": i.e., the opinion that 'nodular changes' caused by a "significant amount of coal dust accumulation in the lung" and seen on x-ray is a *sine qua non* for a finding that exposure to coal dust was

[2] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

> a significant cause of diagnosed COPD. Yet Dr. Young provided no explanation of why his opinion should be accepted over the contrary opinions of the experts to whom he referred. Second, Dr. Young's opinion is not only in conflict with the experts to whom he referred, but it is in conflict with the regulations themselves, which provide that the presence of pneumoconiosis can be established "notwithstanding a negative x-ray."

Decision and Order at 7-8 (citations omitted).

The administrative law judge however credited the opinions of treating physicians, Drs. Hawkins and Boswell, that COPD, caused at least in part by coal dust exposure, contributed to claimant's pulmonary disability. The administrative law judge found that the treatment notes, dated November 28, 2006, December 12, 2006, March 16, 2007 and July 12, 2007, Dr. Hawkins reported that claimant had coal workers' pneumoconiosis and COPD, mildly reduced bilateral chest sounds and mildly increased expiratory time, minimal productive cough, and continuing exertional dyspnea. Decision and Order at 9; Claimant's Exhibit 4. The administrative law judge found that in his September 28, 2007 report, Dr. Hawkins diagnosed coal workers' pneumoconiosis and COPD due to twenty-four years of exposure to coal mine dust and thirty-two years of smoking, but concluded that he could not "apportion with any degree of certainty which disease causes what portion of the disability." Decision and Order at 9. The administrative law judge found that in his December 13, 2007 deposition, Dr. Hawkins testified that he diagnosed COPD based on claimant's x-ray, clinical findings, respiratory symptoms, coal mine employment and smoking histories. Decision and Order at 9; Employer's Exhibit 3. The administrative law judge found that Dr. Hawkins's opinion constitutes a reasoned and documented opinion that claimant has legal pneumoconiosis. Decision and Order at 9.

The administrative law judge also found that Dr. Boswell was claimant's primary care physician since May 1, 2006. Decision and Order at 8; Claimant's Exhibit 5. The administrative law judge determined that Dr. Boswell's diagnosis of coal workers' pneumoconiosis and COPD was reasoned and documented, based on his treatment notes, x-ray, pulmonary function study indicating COPD, symptoms, coal mine employment, medical and smoking histories, and clinical findings of reduced air movement bilaterally. Decision and Order at 8-9; Claimant's Exhibit 5. Although Dr. Boswell was at first uncertain whether coal dust exposure significantly contributed to claimant's COPD, the administrative law judge found that his "reliance on the opinion of Dr. Hawkins - to whom Dr. Boswell had referred [c]laimant for the pulmonary specialist's examination and medical judgment - was reasonable." Decision and Order at 9. The administrative law judge consequently found that because Dr. Boswell treated claimant for more than one year and thoroughly understood claimant's respiratory condition, his opinion is entitled to substantial weight, but because it was dependent in part on Dr. Hawkins's opinion, Dr. Boswell's opinion was not entitled to controlling weight pursuant to 20

C.F.R. §718.104(d). *Id.* The administrative law judge further considered that, assuming that Dr. Boswell's opinion is entitled to no weight because he relied on Dr. Hawkins's opinion, Dr. Hawkins's opinion is entitled to greater weight than the opinion of Dr. Young. *Id* at 10. The administrative law judge considered all the evidence on the existence of pneumoconiosis pursuant to Section 718.202(a) and found that the medical opinion evidence outweighed the x-ray evidence to establish the existence of legal pneumoconiosis. *Id.*

Employer argues that the administrative law judge incorrectly found that Dr. Young relied on the negative x-ray evidence as the sole basis for his conclusion that exposure to coal dust is not a significant contributing factor to the miner's COPD, when Dr. Young also relied on claimant's smoking history and information that his job involved work as an above ground miner, working inside a vehicle. Employer also argues that the administrative law judge mischaracterized Dr. Young's opinion in finding that it is in conflict with expert opinions, and hostile to the Act and the implementing regulations. Employer asserts that Dr. Young's opinion does not foreclose the possibility that severe COPD can be related to coal dust exposure but, rather, states that it is rare in the absence of a positive x-ray reading. We disagree.

Contrary to employer's arguments, the administrative law judge acknowledged that Dr. Young based his opinion not only on negative x-ray evidence, but also on physical examination, twenty-six years of coal mine employment, symptoms, medical history, clinical findings, a smoking history of one pack per day from 1947 to 1982 and pulmonary function and blood gas studies. Decision and Order at 6-7. The administrative law judge also found uncontradicted claimant's hearing testimony that, although he was a ground miner who worked inside a bulldozer with an air-conditioned enclosed cabin, he was "breathing" a considerable amount of "coal dust rock" because the vents failed to filter it out. Decision and Order at 3, *quoting* Hearing Transcript at 28-29. Furthermore, we agree with the Director that Dr. Young's statement, that he could not conclude that coal dust exposure contributes to claimant's severe obstructive impairment without x-ray evidence of changes attributable to coal dust exposure,[3] supports the administrative law judge's finding that this opinion is contrary to the regulatory definition of pneumoconiosis at Section 718.202(a)(4) that states:

[3] Dr. Young additionally stated that, in his experience, even if there were mild radiographic changes, it would not impact his opinion and, if there were severe radiographic changes, it "might" impact his opinion, but that "one has to have significant radiographic changes" to conclude that coal dust contributed to claimant's chronic obstructive pulmonary disease. Employer's Exhibit 4 at 19-20.

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in [Section] 718.201.

20 C.F.R §718.202(a)(4). The administrative law judge may reject the opinion of a physician whose basic medical assumptions are contrary to, or in conflict with, the spirit and purpose of the Act. *Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985); *Hoffman v. B & G Construction Co.*, 8 BLR 1-65, 1-67 (1985). In this case, the administrative law judge permissibly found that although Dr. Young agreed that COPD is a part of the legal definition of pneumoconiosis, his statement that "one has to have significant radiographic changes" to conclude that coal dust contributed to claimant's COPD, is contrary to the regulatory definition of pneumoconiosis at Section 718.201(a)(2). *Id.; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 6-10; Employer's Exhibit 4 at 19-20. In addition, the administrative law judge reasonably gave no weight to Dr. Young's opinion because the physician did not explain why his "somewhat controversial" opinion should be accepted over the opinions of the experts he acknowledged and referred to in his deposition. *Clark*, 12 BLR at 1-155; Decision and Order at 7; *see* Employer's Exhibit 4. We affirm, therefore, the administrative law judge's determination that Dr. Young's opinion is entitled to no weight pursuant to Section 718.202(a)(4).

Employer also argues that the administrative law judge erred in finding that the opinions of Drs. Hawkins and Boswell establish the existence of legal pneumoconiosis. Employer specifically asserts that Dr. Hawkins's opinion is not well-reasoned because he did not explain how he concluded that claimant has pneumoconiosis. Further, employer contends that because Dr. Boswell relied on Dr. Hawkins's opinion, his opinion on the existence of pneumoconiosis merits no weight. We reject employer's contentions.

The administrative law judge reasonably exercised his discretion to rely on the opinions of claimant's treating physicians, Drs. Hawkins and Boswell, which he found were documented and reasoned, based on their treatment notes and Dr. Hawkins's deposition testimony referencing claimant's clinical findings, respiratory symptoms, x-ray, pulmonary function test and smoking, medical and work histories, in finding legal pneumoconiosis. *Clark*, 12 BLR at 1-155; Decision and Order at 9.[4] Furthermore, the

[4] We reject employer's contention that Dr. Young's opinion, in conjunction with evidence of the reversibility of claimant's impairment, shown on the pulmonary function tests after the administration of bronchodilators, supports a finding that claimant has failed to meet his burden of proof to establish that he suffers from pneumoconiosis. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Employer has failed to support its allegation and our review of the records reflects that Drs. Hawkins and Boswell

administrative law judge assessed the weight of the evidence without Dr. Boswell's opinion and reasonably found that Dr. Hawkins's reasoned and documented opinion was entitled to greater weight than Dr. Young's discounted opinion. *Clark*, 12 BLR at 1-155; Decision and Order at 10. Consequently, we affirm the administrative law judge's finding that claimant has met his burden of proof regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Although employer cites to evidence to support its contentions that claimant did not have legal pneumoconiosis arising out of coal mine employment and that pneumoconiosis did not contribute to his total disability, its arguments on appeal amount to little more than a request that the Board reweigh the evidence, which we are not authorized to do. *See Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989). Because the administrative law judge's findings are supported by substantial evidence, we affirm his findings that claimant established the presence of pneumoconiosis arising out coal mine employment and total disability due to pneumoconiosis pursuant to Sections 718.202(a), 718.203(b) and 718.204(c).

Lastly, the Director correctly asserts that the administrative law judge failed to determine the date from which benefits are payable pursuant to 20 C.F.R §725.503(b). The Director proposes that benefits should be payable beginning with the month in which claimant filed his claim, June 2006. Neither claimant nor employer has responded to the Director's position. Because we affirm the administrative law judge's finding that Dr. Young's opinion is entitled to no weight, and there is no other evidence that establishes that claimant was not totally disabled due to pneumoconiosis after he filed his claim for benefits, we modify the administrative law judge's Decision and Order Awarding Benefits to include a June 2006 date for the commencement of benefits. 20 C.F.R §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

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considered that the pulmonary function testing revealed a moderate to severe obstructive defect with an FEV1/FVC of 52% that "improved modestly" to 55% with bronchodilator. Claimant's Exhibits 4, 5.

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

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