BRB No. 09-0491 BLA

ELVIE L. DECKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEBSTER COUNTY COAL CORPORATION	)	DATE ISSUED: 06/14/2010
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2007-BLA-05057) of Administrative Law Judge Daniel F. Solomon, awarding benefits and granting claimant's request for modification of the denial of a subsequent claim[1] filed pursuant to the provisions of the

[1] Claimant's initial claim for benefits, filed on September 26, 2000, was denied by the district director on January 12, 2001, for failure to establish any element of entitlement. Director's Exhibits 1-3, 1-161. Claimant filed the present subsequent claim on February 17, 2004. Director's Exhibit 3. On January 7, 2005, the district director denied benefits, finding that the evidence was sufficient to establish the existence of pneumoconiosis, but insufficient to establish total disability. Director's Exhibit 23. On

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).[2] The administrative law judge accepted the parties' stipulation to at least twenty-eight years of coal mine employment, and adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge reviewed the evidence submitted in support of modification, in conjunction with the earlier evidence, and found that claimant had established both a change in his condition and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, as the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R §718.204(b).[3] Considering the entire record, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge granted claimant's request for modification, and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the weight of the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Employer also challenges the administrative law judge's reliance on the preamble to the 2001 regulatory amendments in weighing the conflicting medical opinions of record. Claimant responds, urging affirmance of the administrative law judge's award of benefits, to which employer replies in support of its position. The

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September 19, 2005, claimant filed a timely request for modification of the district director's denial of benefits. Director's Exhibit 28.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant's subsequent claim was filed before January 1, 2005.

[3] In reviewing the record as a whole on modification at 20 C.F.R. §725.310, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.[4]

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 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer argues that the administrative law judge improperly applied "principles" derived from the preamble to the 2001 amended regulations[6] to evaluate the evidence on the issues of legal pneumoconiosis and disability causation. Employer asserts that "[t]he recognition in the [p]reamble that coal dust exposure may cause obstructive lung disease is not a 'fact' that can be officially noticed," and that the administrative law judge therefore improperly discredited the medical opinion of Dr. Repsher, who found that "[c]oal workers' pneumoconiosis can be [progressive and latent], but only rarely." Employer's Brief at 28, 33. Additionally, employer contends that the administrative law judge's reference to the preamble, absent notice and an opportunity to respond, constituted an untimely evidentiary ruling, and denied employer due process.

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

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1 at 157-159.

[6] In the preamble to the 2001 amended regulations, the Department of Labor (DOL) stated:

> The Department has concluded … that the prevailing view of the medical community and the substantial weight of the medical and scientific literature supports the conclusion that exposure to coal mine dust may cause chronic obstructive pulmonary disease. Each miner must therefore be given the opportunity to prove that his obstructive lung disease arose out of his coal mine employment and constitutes "legal" pneumoconiosis.

65 Fed. Reg. 79923 (Dec. 20, 2000).

We are not persuaded that the administrative law judge imposed an improper evaluative framework for his assessment of the conflicting medical evidence. An administrative law judge, as part of his deliberative process, may examine whether medical rationales are consistent with the conclusions contained in medical literature and scientific studies relied upon by the Department of Labor (DOL) in drafting the definition of legal pneumoconiosis.[7] *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). Moreover, because the preamble and DOL's comments are relevant to the appropriate interpretation of the 2001 amendments to the regulations, their use cannot come as a surprise to parties involved in the litigation of black lung claims under these regulations. We therefore reject employer's assertion that the administrative law judge's review of the medical opinions in light of the "principles" set forth in the preamble *per se* constituted use of "extra-record" evidence, an untimely evidentiary ruling, or a denial of due process.[8]

We next address employer's challenge to the administrative law judge's analysis of the medical opinion evidence of record on the issue of legal pneumoconiosis under Section 718.202(a)(4). Employer argues that, in rejecting the medical opinions of Drs. Repsher, Rosenberg, and Jarboe, the administrative law judge selectively analyzed the evidence, mischaracterized the medical opinions, substituted his own opinion for those of the medical experts, and failed to comply with the provisions of the Administrative Procedure Act (APA), 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). Some of employer's arguments have merit.

In evaluating the medical opinions of record at Section 718.202(a)(4), the administrative law judge noted that, while all of the physicians of record diagnosed an obstructive lung disease, Drs. Repsher, Rosenberg and Jarboe "exclude[d] coal mine dust as a cause" thereof. Decision and Order at 24, 29. The administrative law judge found

[7] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] We therefore reject, as inapposite, employer's argument that the administrative law judge's reference to the preamble violates the Board's directive in *L.P.* [*Preston*] v. *Amherst Coal Co.*, 24 BLR 1-57 (2008), that the administrative law judge should make evidentiary rulings prior to rendering a decision.

that Drs. Simpao,[9] Chavda[10] and Rasmussen,[11] who opined that the effects of smoking and coal dust exposure were indistinguishable and that claimant's significant exposure to coal dust, significant history of smoking, and obesity likely contributed to his pulmonary

[9] Dr. Simpao performed the Department of Labor evaluation, and diagnosed clinical pneumoconiosis, asthma, and morbid obesity. Dr. Simpao acknowledged an extensive smoking history that could cause claimant's symptoms, but noted that smoking and coal dust exposure can have a synergistic effect. Decision and Order at 28; Director's Exhibit 13; Claimant's Exhibit 6 at 15, 20-22. Dr. Simpao stated that "[m]ultiple years of coal dust exposure are medically significant in [claimant's] pulmonary impairment," Director's Exhibit 13 at 13, and acknowledged that claimant's restrictive lung disease and hypoxemia could be due to obesity. Claimant's Exhibit 6 at 16-17. He testified that claimant had a severe obstructive airway disease, and a moderate restrictive disease, Deposition of December 7, 2007 at 15, 21, 23, and suffered from chronic obstructive pulmonary bronchitis and asthma that had been aggravated substantially by the inhalation of coal dust for twenty-seven years. Claimant's Exhibit 6 at 22-23.

[10] Dr. Chavda opined that claimant's obstructive airways disease "could be caused by pneumoconiosis, asthma, COPD or chronic bronchitis," but concluded that the restrictive condition was principally caused by coal dust exposure. Decision and Order at 28; Claimant's Exhibits 11, 5; May 2, 2008 Deposition at 12, 16. While claimant's obesity could cause a restriction, that alone could not cause his level of impairment, and the impact of smoking, coal dust exposure, and obesity could not be differentiated. Decision and Order at 28-29; Claimant's Exhibits 11 at 13, 16; May 2, 2008 Deposition at 21. Dr. Chavda concluded that claimant's chronic lung disease was due to coal dust exposure, smoking, and obesity; that the abnormal arterial blood gas study results were due to coal dust exposure, or smoking, or both, as a synergistic effect between the two had occurred in claimant's case; and that claimant suffered a chronic restrictive and obstructive pulmonary disease significantly related to or substantially aggravated by coal dust exposure in thirty years of mining. Decision and Order at 29; Claimant's Exhibits 5 at 3, 11 at 21; May 2, 2008 Deposition at 12.

[11] Dr. Rasmussen attributed claimant's restrictive airways disease to obesity, smoking and coal dust exposure. Decision and Order at 29; Claimant's Exhibit 12. He opined that the obesity can cause a restriction, but not an obstruction, and that excluding coal dust exposure as a cause of claimant's obstructive disease would be illogical, as smoking and coal dust exposure cause "essentially identical" forms of COPD. Claimant's Exhibit 12 at 2-3. Dr. Rasmussen stated that chronic obstructive lung disease in miners is indistinguishable from that due to smoking, but opined that coal dust was a "significant contributing cause" of claimant's disabling disease. Decision and Order at 33; Claimant's Exhibit 12 at 3.

impairment, provided well-reasoned diagnoses of legal pneumoconiosis. *Id.* at 33-34. The administrative law judge found that their opinions were based on a complete assessment of claimant's symptoms, occupational and smoking histories, and valid arterial blood gas and pulmonary function studies, and that:

> Dr[s]. Rasmussen's, Chavda's, and Simpao's determination better reflect [sic] the entire record as there is evidence of both a restrictive and obstructive disorder. I note that Drs. Rasmussen's and Chavda's [sic] made their determination based on the more recent and valid spirometry in the record. . . . I credit all three doctors in finding that [claimant] has a chronic obstructive pulmonary disorder aggravated by his coal mine employment. I also credit Dr. Chavda's opinion in finding that [claimant's] restrictive airway disease was caused, at least in part, by [claimant's] coal mine employment.

Id. at 34.

By contrast, the administrative law judge identified various factors affecting the probative value of the contrary opinions of Drs. Repsher,[12] Rosenberg,[13] and Jarboe,[14]

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[12] Dr. Repsher's diagnoses included obesity [347 lbs.], obstructive sleep apnea, and probable obesity hypoventilation syndrome, unrelated to coal dust exposure. Dr. Repsher found no evidence of pneumoconiosis or any other pulmonary or respiratory disease caused by, or aggravated by, coal mine employment. Employer's Exhibit 10 at 2-3. He found "mild and clinically insignificant COPD," and stated that, although coal dust exposure can aggravate COPD, it is "very unlikely statistically." Dr. Repsher indicated that the effects of coal dust exposure may be distinguished from other causes of COPD and, in the present case, he based his conclusions on claimant's "significant smoking history, statistical likelihood of COPD being caused by smoking rather than coal dust," claimant's FEV_1 and FVC ratio indicating that smoking, rather than coal dust exposure, caused the obstructive airflow disease, and various medical literature studies. Decision and Order at 29-30; Employer's Exhibits 10, 11 at 25-26, 13. Dr. Repsher concluded that claimant's respiratory impairment is "not because of intrinsic lung disease but because of the effect of his obesity on his lung function." Employer's Exhibit 11 at 24-26.

[13] Dr. Rosenberg found no clinical or legal pneumoconiosis, and diagnosed marked obesity, hypoxemia, and hypoventilation, opining that claimant's "respiratory failure and associated disability" is "related to multiple factors which are not coal mine dust related," adding: "[t]he pattern of obstruction in the miners is such that while the FEV_1 decreases, the FEV_1% generally is preserved." Employer's Exhibit 10 at 2-4. He stated that, although coal dust exposure can cause obstruction, such exposure is not, of itself, sufficient to relate an obstruction to coal dust inhalation, and that claimant's condition worsened due to weight gain and smoking. He concluded that claimant's

and determined that these opinions were not well-reasoned. Specifically, the administrative law judge characterized Dr. Repsher's opinion as internally inconsistent, conclusory, and based heavily on statistical probabilities. *Id*. at 29-31. Further, he found that Dr. Repsher's opinion was weakened by his reliance on medical literature and scientific studies that predated the 2001 amendments to the regulations, and that were related to clinical, not legal, pneumoconiosis. The administrative law judge also found that Drs. Repsher, Rosenberg and Jarboe based their opinions, in part, upon invalid and/or less recent pulmonary function studies, and failed to "address how the partial reversibility exhibited on [claimant's] earlier spirometry excludes the possibility that coal mine dust aggravated an already existing condition." *Id.* at 32-33. The administrative law judge concluded:

> I afford less weight to Drs. Repsher's, Jarboe's, and Rosenberg's opinions as I find they are not well-reasoned. I find all three physicians' opinions to be flawed for relying on the correlation between the Miner's weight gain and worsened pulmonary function and arterial blood gases to determine that obesity caused the miner's obstructive disease and hypoxemia. I find this logic to be flawed as this correlation could simply be coincidental. It is a well established fact that pneumoconiosis is a progressive disease. Accordingly, pneumoconiosis could just as easily cause the Miner's pulmonary condition to worsen over the last ten or more years. By relying on the correlation between the Miner's studies and his weight gain, the doctors fail to address the Miner's history of coal dust exposure which they all admit is significant. Therefore, I find Drs. Repsher's, Jarboe's and Rosenberg's opinions to be not well-reasoned as they rely to (sic) heavily

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worsened condition, respiratory failure and associated impairment are related to multiple factors, including increasing obesity, that are not coal mine dust related. Decision and Order at 21-22, 30, n.13; Employer's Exhibits 8 at 3-5, 9 at 15-19, 25-26, 10.

[14] Dr. Jarboe found no clinical or legal pneumoconiosis, and diagnosed reversible airways disease, marked obesity, and significant air trapping that is "nearly always caused by cigarette smoking and/or bronchial asthma." Employer's Exhibits 2 at 5-7, 3, 4. He found a moderate airflow obstruction from smoking and asthma, and attributed claimant's significantly changed respiratory condition, and worsened pulmonary function study and arterial blood gas study values, to weight gain and smoking. Employer's Exhibit 3 at 14. He opined that exposure to coal dust did not cause or aggravate the respiratory impairments, citing asthma, allergies, and a significantly reversible airflow obstruction on pulmonary function studies. *Id*. at 13-14, 22-24. He stated that claimant exhibited characteristics of smoking induced lung disease associated with severe obesity, as opposed to those caused by inhalation of coal dust, and that coal mine employment "is not a clinically significant contributing factor to [claimant's] impairment." *Id*. at 25-26, 38-39.

> on the correlation between the Miner's weight gain and studies, without properly addressing the impact of his coal dust exposure.

Decision and Order at 31.

The determination of whether a medical opinion is documented and reasoned rests within the discretion of the administrative law judge, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987), as does the assessment of the weight and credibility to be accorded to the conflicting medical evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). However, in evaluating the conflicting medical opinions in this case, employer's argument that the administrative law judge selectively analyzed the evidence, impermissibly relied on his own opinion in discounting the opinions of Drs. Repsher, Rosenberg and Jarboe, and failed to subject the opinions of Drs. Rasmussen, Chavda and Simpao to the same scrutiny, has merit. *See generally Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(*en banc*); *Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1984). For example, the administrative law judge faulted Drs. Repsher, Rosenberg and Jarboe for "relying on the correlation between the miner's weight gain and his worsened pulmonary function and arterial blood gases" in concluding that obesity caused claimant's impaired pulmonary function, on the basis that "this correlation could simply be coincidental." Decision and Order at 31. However, Drs. Repsher, Jarboe and Rosenberg based their opinions on numerous additional factors, including analysis of the residual volume percentage, the correlation between claimant's FEV_1 and MVV values that demonstrated a statistical unlikelihood that coal dust exposure aggravated claimant's COPD, as well as the specific physiological effects of his "morbid obesity" and his smoking history. *Id.* at 29-31. Also troubling is the administrative law judge's observation that, because all of the physicians found some evidence of COPD and acknowledged a significant coal mine employment history, "it is reasonable that smoking[15] had an adverse effect on Claimant's breathing capacity." *Id.* at 34. Because he fails to identify medical evidence in the record to support the foregoing inferences, the administrative law judge has improperly substituted his own opinion for that of the medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Consequently, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4), and remand this case for the administrative law judge to reevaluate the medical opinion evidence of record, maintaining the burden of proof on claimant to establish the existence of legal pneumoconiosis. *See Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986). Because we have vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), we also vacate his finding that claimant established disability causation pursuant to

[15] It is clear, from the context of the paragraph, that the administrative law judge mistakenly substituted the word "smoking" for "coal dust exposure." *See* Decision and Order at 34.

Section 718.204(c), and instruct him to reconsider this issue, if reached, on remand. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 1-185-186 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, J., dissenting:

I respectfully dissent from the conclusion reached by the majority with respect to the administrative law judge's determination to credit the medical opinions of Drs. Simpao, Chavda and Rasmussen over the contrary opinions of Drs. Repsher, Rosenberg and Jarboe, in finding the existence of legal pneumoconiosis established under Section 718.202(a)(4) and disability causation established under Section 718.204(c). While the statement, that pneumoconiosis could just as easily cause claimant's pulmonary condition to worsen over time as could claimant's weight gain, appears to reflect the administrative law judge's personal opinion, the administrative law judge's broader, and ultimate, conclusion was that Drs. Repsher, Rosenberg and Jarboe all ignored the factor of claimant's twenty-eight years of coal mine employment in assessing the cause of his respiratory impairment. The administrative law judge, moreover, has fully discussed the evidence of record, rationally resolved the conflicts therein, and provided multiple valid reasons for his credibility determinations. Therefore, I would affirm the award of benefits.

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BETTY JEAN HALL
Administrative Appeals Judge