BRB No. 10-0522 BLA

JARRELL D. COCHRAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 06/09/2011
	)	
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (09-BLA-5245) of Administrative Law Judge Richard A. Morgan on a subsequent claim[1] filed 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.

[1] Claimant's previous claim for benefits, filed on February 3, 1995, was denied for failure to establish the existence of pneumoconiosis. The Board affirmed the denial of benefits on May 16, 2003. Claimant's petition for modification was denied because claimant failed to establish the existence of pneumoconiosis. The Board affirmed the denial of modification on July 25, 2006.

§§921(c)(4) and 932(*l*)).[2] The administrative law judge adjudicated the claim, filed on February 27, 2008, pursuant to the regulations at 20 C.F.R. Parts 718 and 725, and credited claimant with at least sixteen years of coal mine employment. The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Considering the entire record, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge improperly utilized the preamble to the 2001 amendments to the regulations to support his finding that new evidence submitted in support of this subsequent claim was sufficient to establish legal pneumoconiosis at Section 718.202(a)(4), and a change in an applicable condition of entitlement under Section 725.309. Employer also contends that the administrative law judge failed to provide valid reasons for crediting the opinion of Dr. Rasmussen over the opinions of Drs. Zaldivar and Hippensteel, in finding the existence of pneumoconiosis established at Section 718.202(a), and disability causation established

[2] Relevant to this case, the amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), reinstated the rebuttable presumption of total disability due to pneumoconiosis for miners with at least fifteen years of underground coal mine employment or surface coal mine employment in conditions substantially similar to those in an underground mine. The administrative law judge determined that these amendments, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments, had no impact on this case because claimant failed to demonstrate that his approximately sixteen years of combined surface and underground coal mine employment were equivalent to at least fifteen years of underground employment. Decision and Order at 3-4, 30-31.

[3] 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 "one of the applicable conditions of entitlement . . . has changed since the denial of the prior claim became final." 20 C.F.R. §725.309(d); *see 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). Thus, in this case, claimant was required to submit new evidence sufficient to establish the existence of pneumoconiosis in order to have his subsequent claim reviewed on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

at Section 718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility; s*ee Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); the resolution of conflicting evidence and varying medical theories expounded by expert witnesses rests in his discretion as fact-finder. *See generally Piney Mountain Coal Co. v. Mays*, 176 F.3d 21 BLR 2-587 (4th Cir. 1999).

In considering the conflicting medical opinion evidence at Section 718.202(a)(4), the administrative law judge accurately summarized the physicians' qualifications, underlying documentation and conclusions, and determined that the core of the dispute was the etiology of claimant's totally disabling chronic obstructive pulmonary disease (COPD)/emphysema. Decision and Order at 10-14, 21-26. Dr. Rasmussen opined that claimant's disabling COPD was caused by a combination of coal dust exposure, smoking and asthma, and that the signs, symptoms and mechanisms by which smoking and coal dust cause lung destruction and emphysema are identical. In contrast, Drs. Zaldivar and Hippensteel opined that impairments due to smoking, asthma and coal dust exposure can be differentiated and, in the absence of coal dust-related radiographic abnormalities, these doctors ruled out coal dust exposure as a cause of claimant's asthma and smoking-related emphysema. *Id.*; Director's Exhibit 15; Claimant's Exhibit 3; Employer's Exhibits 1, 4-

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment, and his finding that the evidence of record established total respiratory disability at 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 2; Director's Exhibit 2.

7. Faced with the physicians' conflicting medical theories, the administrative law judge permissibly examined whether the physicians' opinions were consistent with the conclusions contained in the medical literature credited by the Department of Labor (DOL) in revising the definition of legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *see J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Company v. Director, OWCP* [*Obush*], F.3d , 2011 WL 1366355 (3d Cir. 2011); *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). We reject employer's argument that the administrative law judge's review of the medical opinions in light of the preamble to the revised regulations was improper, shifted the burden of proof, or failed to comport with the requirements 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). To the contrary, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion was "unusually thorough," consistent with the conclusions contained in the preamble, and entitled to determinative weight, whereas the opinions of Drs. Zaldivar and Hippensteel were unpersuasive, inconsistent with the conclusions contained in the preamble, and entitled to less weight. Decision and Order at 11, 25-26; *see* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Obush*, 24 BLR at 1-125, 1-126; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the newly submitted evidence was sufficient to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309, and that the weight of the evidence established legal pneumoconiosis pursuant to Section 718.202(a).

Turning to the issue of disability causation at Section 718.204(c), the administrative law judge properly credited Dr. Rasmussen's opinion as well-reasoned, and discounted the opinions of Drs. Zaldivar and Hippensteel because they did not diagnose pneumoconiosis, in direct contradiction to the administrative law judge's finding. Decision and Order at 33; *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As the administrative law judge's findings under Section 718.204(c) are supported by substantial evidence, they are affirmed. Consequently, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge