BRB No. 10-0591 BLA

BILLY E. BELT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/08/2011
	)	
PEABODY COAL COMPANY	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Vernon L. Plummer, II (Plummer Law Offices), Shelbyville, Illinois, for claimant.

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

Rita Roppolo (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (05-BLA-5963) of Administrative Law Judge Donald W. Mosser rendered 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. §§921(c)(4) and 932(*l*)) (the Act). After crediting claimant with at least twenty-five years of qualifying coal mine employment,[2] the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Considering this claim on its merits, the administrative law judge found that claimant established that he has legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) arising in part out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.203,[4] and that he is totally disabled due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis, pursuant to Section

[1] Claimant filed a previous claim on April 25, 2000, which was denied on January 8, 2001, because claimant did not establish total disability or total disability due to pneumoconiosis. Director's Exhibit 1 at 9, 116. Claimant filed this current claim on May 17, 2004. Director's Exhibit 2.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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*).

[3] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses 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).

[4] The administrative law judge properly recognized that his finding of legal pneumoconiosis necessarily subsumed the inquiry of whether claimant's pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203; *Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 19.

718.202(a), and total disability due to pneumoconiosis, pursuant to Section 718.204(c). Claimant responds in support of the administrative law judge's award of benefits, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief, but correctly notes that Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims, does not apply to this case, because the claim was filed before January 1, 2005.[5] Director's Brief at 1 n.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 rational, supported by substantial evidence, and in accordance with applicable law. 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 pursuant to 20 C.F.R. Part 718, claimant must establish 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 of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Legal Pneumoconiosis

Employer initially asserts that, in finding that claimant established the existence of legal pneumoconiosis, pursuant to Section 718.202(a)(4), the administrative law judge erred in crediting the opinion of Dr. Cohen,[6] that the miner's COPD was due in part to coal mine dust exposure, and discrediting the opinions of Drs. Repsher[7] and Fino,[8] who

[5] The administrative law judge's findings that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), are unchallenged. Thus, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5.

[6] Dr. Cohen, in a report dated October 15, 2009, and deposition taken on April 21, 2010, opined that claimant's chronic obstructive pulmonary disease (COPD) is due to both coal mine dust exposure and smoking. Claimant's Exhibit 1 at 6; Employer's Exhibit 8 at 24-25.

[7] Dr. Repsher, in reports dated February 16, 2005, and April 28, 2010, opined that claimant's COPD is due to smoking. Employer's Exhibits 1, 7.

attributed the miner's COPD entirely to smoking.[9] Employer's Brief at 7-15. We disagree.

Initially, we reject employer's assertion that the administrative law judge erred in crediting the opinion of Dr. Cohen as the best reasoned and documented, and sufficient to establish the existence of legal pneumoconiosis. Employer's Brief at 7-11. The administrative law judge properly found that Dr. Cohen attributed approximately seventy percent of claimant's impairment to smoking, and thirty percent to coal mine dust exposure, based on claimant's twenty-five and one-half years of coal mine employment, his forty pack-year smoking history, his lack of other contributing exposures, his symptoms, and the results of objective testing, including a pulmonary function study indicating moderately severe obstructive disease with moderate diffusion impairment, and resting blood gas studies indicating significant gas exchange abnormalities. Decision and Order at 8; Claimant's Exhibit 1; Employer's Exhibit 8 at 14-15. The administrative law judge further found that Dr. Cohen explained that, while there is no medical test to differentiate the effects of coal mine dust exposure from those of smoking, because both exposures cause similar types of impairment, medical studies have established a link between COPD and coal mine dust exposure in miners, such as claimant, who are especially susceptible. Decision and Order at 8-9, 15-16; Claimant's Exhibit 1 at 5-6; Employer's Exhibit 8 at 19-20, 22-25, 36, 41-49, 55-59. The administrative law judge noted that, while Dr. Cohen acknowledged that claimant's smoking history alone may have been sufficient to cause a disabling respiratory impairment, he emphasized that claimant's coal mine dust exposure was nonetheless a significant contributing factor and

---

[8] Dr. Fino similarly opined, in his reports dated May 26, 2006 and April 7, 2010, that claimant's COPD is due entirely to smoking. Employer's Exhibits 2, 6.

[9] The administrative law judge also considered the opinions of Drs. Houser, Simpao and O'Bryan. Dr. Houser, in office visits dated from June 15, 2005 through June 5, 2006, diagnosed claimant with COPD due to coal mine dust exposure and smoking. Claimant's Exhibit 4. Dr. Simpao stated, in a reports dated June 8, 2000 and June 4, 2004, that claimant has coal workers' pneumoconiosis. Director's Exhibits 1 at 84; 13 at 23. Dr. O'Bryan, in a report dated November 28, 2000, did not find evidence of pneumoconiosis, and diagnosed chronic bronchitis due to smoking. Director's Exhibit 1 at 25. The administrative law judge credited the opinion of Dr. Houser, as well-documented, well-reasoned, and consistent with Dr. Cohen's opinion, and discredited the opinions of Drs. Simpao and O'Bryan, finding them inadequately explained. As these findings are unchallenged on appeal, they are affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14, 17-18.

put him "over the edge." Decision and Order at 9; Employer's Exhibit 8 at 24-25, 29-32, 52-53.

Contrary to employer's arguments, having specifically considered these aspects of Dr. Cohen's opinion, the administrative law judge permissibly credited Dr. Cohen's opinion as well-reasoned and well-documented, and more consistent with the scientific premises underlying the regulations that both coal mine dust-induced and cigarette-smoke-induced emphysema occur through similar mechanisms, than were the opinions of Drs. Fino and Repsher. 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. Nov. 29, 2007)(unpub.); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], F.3d , 2011 WL 1366355 (3d Cir. 2011); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 8-9; Claimant's Exhibit 1 at 5; Employer's Exhibit 8 at 36, 42-44. Further, in evaluating the expert opinions of record in conjunction with the Department of Labor's discussion of the medical science cited in the preamble to the amended regulations, the administrative law judge did not improperly treat the preamble as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis.[10] *See Obush*, 24 BLR at 1-125-26; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990); Employer's Brief at 19-29. Rather, the administrative law judge permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. 20 C.F.R. §718.201(a)(2), (c); *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. Consequently, we affirm the administrative law judge's determination to credit Dr. Cohen's diagnosis of legal pneumoconiosis, as adequately explained and supported by substantial evidence. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

We further reject employer's contention that the administrative law judge erred in discounting the opinions of Drs. Repsher and Fino, that claimant does not suffer from legal pneumoconiosis or any coal dust-related disease. Employer's Brief at 12-13. The

[10] Nor, as employer contends, did Dr. Cohen opine that he will always diagnose COPD due to both coal mine dust exposure and smoking, in cases involving a miner who smokes. Employer's Brief at 11. Dr. Cohen specifically testified that he has seen miners who both have significant gas exchange abnormalities, and significant coal dust and tobacco exposures, and has concluded that neither exposure played a role. Employer's Exhibit 8 at 36-37, 42-43.

administrative law judge permissibly assigned less weight to the medical opinion of Dr. Repsher, in part, because, in his 2005 report, Dr. Repsher appeared to link the presence of legal pneumoconiosis to the presence of clinical pneumoconiosis, contrary to the Department of Labor's recognition that coal dust can contribute significantly to a miner's obstructive lung disease, independent of clinical pneumoconiosis.[11] *See* 65 Fed. Reg. 79,940 (Dec. 20, 2000)(noting that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]"); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26; Decision and Order at 16-17; Employer's Exhibit 1 at 3. Additionally, the administrative law judge noted that, in his 2010 report, Dr. Repsher opined that "legal coal workers' pneumoconiosis" could be excluded as a cause of claimant's COPD because the "markedly disproportionate decrease in FEV1 as compared with his decrease in FVC . . . is characteristic of cigarette smoking-induced COPD and not seen with legal [coal workers' pneumoconiosis]." Decision and Order at 16-17; Employer's Exhibit 7 at 1-2. The administrative law judge rationally questioned Dr. Repsher's conclusion because it was based on a pulmonary function study that Dr. Repsher had invalidated. *See Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Decision and Order at 16-17; Employer's Exhibit 7 at 1-2. Therefore, the administrative law judge permissibly concluded that Dr. Repsher failed to adequately explain his conclusion that cigarette smoking was the sole cause of claimant's impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; Decision and Order at 17.

Similarly, with regard to Dr. Fino's opinion, the administrative law judge noted that in explaining the basis for his determination that claimant does not have legal pneumoconiosis, Dr. Fino repeatedly cited, with approval, studies indicating that the relationship between coal mine dust exposure and emphysema was stronger if clinical pneumoconiosis were present. Decision and Order at 16-17; Employer's Exhibit 2 at 7-9. The administrative law judge rationally concluded that Dr. Fino's reliance on these studies indicated that he ruled out coal mine dust exposure as a factor in claimant's impairment based, in part, on his view that the presence of legal pneumoconiosis is tied to the degree of clinical pneumoconiosis that is present. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26; Decision and Order at 16-17; Employer's Exhibit 2 at 7-9. Thus, the administrative law judge permissibly accorded less weight to Dr. Fino's opinion, as contrary to the premises of the regulations and the views accepted

[11] The administrative law judge correctly noted that, in his 2005 report, Dr. Repsher concluded that claimant did not have coal workers' pneumoconiosis, or any coal mine dust-related disease, because there is no radiographic, histologic, pulmonary function test, or arterial blood gas test evidence of coal workers' pneumoconiosis. Decision and Order at 9, 16-17; Employer's Exhibit 1 at 3.

by the Department of Labor. Decision and Order at 17; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

Employer also contends that the administrative law judge impermissibly shifted the burden of proof to employer to rule out coal mine dust exposure as a cause of claimant's COPD, when the administrative law judge found that Drs. Repsher and Fino "ignore[d] the critical issue of whether claimant's impairment was significantly contributed to or substantially aggravated by dust exposure in coal mine employment." Employer's Brief at 13-15. Contrary to employer's contention, the administrative law judge did not improperly shift the burden of proof to employer to rule out coal mine dust exposure as a cause of claimant's COPD, but properly required claimant to "establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports." *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515-16, 22 BLR 2-625, 2-651 (6th Cir. 2003); Decision and Order at 13. By permissibly finding that Dr. Cohen's opinion, as supported by that of Dr. Houser, outweighed the contrary opinions of Drs. Repsher and Fino, the administrative law judge properly found that "claimant suffers from legal pneumoconiosis pursuant to Section 718.20[2](a)(4)." Decision and Order at 19. We, therefore, affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Total Disability Due to Legal Pneumoconiosis

In considering the cause of claimant's disabling respiratory impairment, pursuant to Section 718.204(c),[12] the administrative law judge discussed and weighed the medical

[12] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

opinions of Drs. Cohen, Houser, Repsher, and Fino.[13] Drs. Cohen and Houser opined that claimant's totally disabling COPD is due to both coal mine dust exposure and smoking. Claimant's Exhibits 1, 4; Employer's Exhibit 8. By contrast, Drs. Repsher and Fino opined that claimant's disabling impairment is due entirely to smoking.[14] Employer's Exhibits 2, 6.

Contrary to employer's contention, the administrative law judge properly accorded controlling weight to the opinion of Dr. Cohen, as supported by the opinion of Dr. Houser, because Drs. Cohen and Houser are the only physicians to opine that claimant's COPD is due, in part, to coal mine dust exposure, in accordance with the administrative law judge's own finding of legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 825-26, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008); Decision and Order at 21-22. Moreover, there is no merit to employer's assertion that Dr. Cohen's opinion, that medical science cannot accurately distinguish between the effects of cigarette smoke and coal mine dust, necessarily renders Dr. Cohen's opinion too speculative to establish disability causation. Employer's Brief at 15-16. Rather, as the administrative law judge rationally relied on the reasoned and documented opinion of Dr. Cohen, as supported by the opinion of Dr. Houser, to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on Dr. Cohen's opinion to find that claimant's disabling respiratory impairment is due, in part, to legal pneumoconiosis. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Peabody coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997). Consequently, we affirm the administrative law judge's finding that claimant established total disability due

[13] The administrative law judge noted that the record also contains the opinions of Drs. Simpao and O'Bryan, which had been submitted in support of the prior claim. The administrative law judge permissibly accorded diminished weight to these opinions, as they are significantly older than the evidence submitted with the current claim. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(*en banc*); Decision and Order at 22. On appeal, this finding is not challenged. Therefore, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[14] The administrative law judge correctly noted that while Dr. Repsher did not specify whether claimant's respiratory impairment is totally disabling, he did address the cause of the impairment. Decision and order at 21; Employer's Exhibits 1, 7.

to pneumoconiosis pursuant to Section 718.204(c), based on the credible opinion of Dr. Cohen, as supported by the opinion of Dr. Houser.

Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a), and that his total disability is due to legal pneumoconiosis pursuant to Section 718.204(c), 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.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge