BRB No. 08-0460 BLA

R.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROBINSON PHILLIPS COAL COMPANY	)	
	)	
and	)	
	)	
A.T. MASSEY	)	DATE ISSUED: 03/26/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-BLA-06072) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent claim filed on August 19, 2005, 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 credited claimant with thirty-two years of qualifying 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 the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing all of the record evidence on the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§ 718.202(a),[2] 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that claimant is totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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.[4] 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).

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[1] Claimant's original claim for black lung benefits was filed on December 29, 1970, and was finally denied by the district director on December 16, 1981, for failure to establish any of the elements of entitlement. Director's Exhibit 1. Claimant also filed a claim on January 25, 2002, which was subsequently withdrawn.

[2] The administrative law judge found that claimant established the existence of pneumoconiosis based on the weight of the positive readings by Dr. Meyer, a Board-certified radiologist and B reader, of a series of seven CT scans dated from October 25, 2002 through December 20, 2005. Decision and Order at 4; Employer's Exhibits 5, 9.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established thirty-two years of coal mine employment, the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, total disability pursuant to C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Because claimant's last coal mine employment was in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

Employer argues that the administrative law judge erred in finding that claimant established that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Specifically, employer argues that there is no credible evidence that pneumoconiosis caused claimant's totally disabling respiratory impairment. Employer notes that even though Dr. Zaldivar diagnosed that claimant did not have pneumoconiosis, he nonetheless opined that, assuming that claimant had pneumoconiosis, the disease could not have caused claimant's totally disabling respiratory impairment. Thus, employer contends that it was error for the administrative law judge to discredit Dr. Zaldivar's opinion merely because he did not diagnose pneumoconiosis. Employer further argues that the administrative law judge erred in relying on Dr. Rasmussen's opinion to find that claimant satisfied his burden of proof under 20 C.F.R. §718.204(c) because Dr. Rasmussen opined that it was impossible to distinguish between the effects of smoking and coal dust exposure.

We reject employer's arguments as they are without merit. The regulation at 20 C.F.R. §718.204(c) states that a miner shall be considered totally disabled due to pneumoconiosis, if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause if it has a material adverse effect on the miner's respiratory or pulmonary condition or it 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)(i), (ii); *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Claimant must demonstrate that pneumoconiosis is a necessary condition of disability; it must play more than a *de minimis* role in claimant's disabling respiratory impairment. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003).

The record contains two medical opinions relevant to the issue of disability causation. Dr. Rasmussen examined claimant on November 10, 2005, at the request of the Department of Labor, and diagnosed coal workers' pneumoconiosis based on his positive interpretation of claimant's x-ray and the length of claimant's coal dust exposure. Director's Exhibit 21. Dr. Rasmussen conducted objective testing, which he interpreted as showing an irreversible obstructive respiratory condition consistent with both smoking and coal dust exposure. *Id*. Dr. Rasmussen opined that claimant is totally disabled due to smoking and coal dust exposure. *Id*. He also specifically opined that clinical coal workers' pneumoconiosis contributed in "a material way" to claimant's disabling respiratory condition. *Id*.

Dr. Zaldivar examined claimant on March 8, 2006, and prepared a report dated April 10, 2006, in which he found that claimant had no radiographic evidence of pneumoconiosis. Employer's Exhibit 1. Based on the results of claimant's objective

testing, Dr. Zaldivar opined that claimant is totally disabled as a result of an irreversible obstructive respiratory impairment due to asthma and emphysema caused by smoking. *Id*. Dr. Zaldivar opined that claimant did not suffer any respiratory impairment due to coal dust exposure. *Id*. Dr. Zaldivar wrote at the end of his April 10, 2006 report that "[e]ven if claimant were found to have coal workers' pneumoconiosis by tissue biopsy, my opinion regarding the cause of the pulmonary impairment and degree of impairment would remain the same as I have given here." *Id*.

At a deposition conducted on September 10, 2007, Dr. Zaldivar reviewed a series of seven CT scans dating from October 25, 2002 through December 20, 2005, which had been read by Dr. Meyer, a Board-certified radiologist, as showing the existence of simple coal workers' pneumoconiosis. Employer's Exhibit 8 at 22-26. When asked whether his opinion had changed regarding the existence of clinical pneumoconiosis, Dr. Zaldivar replied:

> No. My opinion if anything is stronger because I now have more information than I did before. He does not have coal workers' pneumoconiosis.

Id. at 26-17. Furthermore, when asked whether his opinion would change if claimant were found to have radiographic evidence of pneumoconiosis, profusion 1/0, consistent with Dr. Rasmussen's x-ray interpretation, Dr. Zaldivar stated:

> No, because the damage caused by dust – by coal workers' pneumoconiosis in the lungs is caused by the burden of dust in the lungs. The chest x-ray doesn't rule in or out the presence of pneumoconiosis since a pathologist may find something where the x-ray or the CT scan did not. *By the way, the CT scan did not [show pneumoconiosis]*. So that means that, if the pathologist finds any macules of pneumoconiosis, it must be very, very, very few, which means the dust burden in the lungs is very, very low.

Id. at 37-38 (emphasis added). Dr. Zaldivar then reiterated his opinion that claimant's disabling respiratory impairment is caused by smoking and long-standing asthma. *Id*. at 50.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge determined that Dr. Zaldivar's opinion was of "no probative value" as to the issue of whether claimant is totally disabled due to pneumoconiosis because Dr. Zaldivar was not of the opinion that claimant has clinical pneumoconiosis, contrary to the administrative law judge's unchallenged finding that the CT scan evidence had established the existence of the disease. Decision and Order at 6. In addition, the administrative law judge noted that "not only did Dr. Zaldivar fail to diagnose pneumoconiosis based on his March 8, 2006

examination . . . but he [also] refused to diagnose pneumoconiosis at his deposition, after reviewing Dr. Meyer's positive interpretations of a series of CT scans taken over a period of three years." *Id.* The administrative law judge found that "[u]nder these circumstances, [Dr. Zaldivar's] testimony that his opinion that the miner does not have coal workers' pneumoconiosis 'is stronger' in light of the CT scan evidence is 'nonsensical.'" *Id.* Thus, the administrative law judge was not persuaded by Dr. Zaldivar's opinion that claimant's disabling respiratory disease was unrelated to clinical pneumoconiosis. *Id.*

The administrative law judge instead credited Dr. Rasmussen's opinion. He found that Dr. Rasmussen's opinion, while "not without flaws," was probative and sufficient to establish that coal dust exposure was at least a contributing factor in claimant's total disability.[5] *Id.* Therefore, the administrative law judge found that claimant satisfied his burden to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Contrary to employer's argument, the administrative law judge may accord less weight to a medical report regarding the cause of claimant's total disability if the physician did not, contrary to the administrative law judge's finding, diagnose the presence of pneumoconiosis or a disabling respiratory impairment. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-709 (4th Cir. 1995). In this case, the administrative law judge found that claimant established the existence of clinical pneumoconiosis based on a series of CT scans that were interpreted by Dr. Meyer as positive for the disease. Although Dr. Zaldivar stated in his April 10, 2006 report, and again during his September 10, 2007 deposition, that his opinion would not change even if claimant was shown to have pathological evidence of pneumoconiosis, he did not indicate that his opinion would change if claimant's CT scans were read as positive for pneumoconiosis. In fact, Dr. Zaldivar, as noted by the administrative law judge, refused to diagnose clinical pneumoconiosis based on the CT scans reviewed by Dr. Meyer, contrary to the administrative law judge's determination with respect to that evidence. Thus, the administrative law judge properly assigned Dr.

[5] The administrative law judge noted that "although the more probative x-ray evidence is negative . . . any error by Dr. Rasmussen in interpreting claimant's x-ray was of no significance, since in fact [claimant] has clinical pneumoconiosis, just as Dr. Rasmussen believed." Decision and Order at 6. The administrative law judge also noted that while Dr. Rasmussen's examination was conducted only two days after claimant's hospitalization for congestive heart failure, his diagnosis of a totally disabling respiratory impairment was not contested by employer. *Id.*

Zaldivar's opinion no probative weight at 20 C.F.R. §718.204(c). *See generally Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Furthermore, we reject employer's contention that the administrative law judge erred in according dispositive weight to Dr. Rasmussen's opinion that, while it is impossible to distinguish between the effects of coal dust exposure and smoking, it is reasonable to conclude that coal workers' pneumoconiosis was a major contributing factor to claimant's totally disabling lung disease. Contrary to employer's assertion, Dr. Rasmussen did not base his disability causation opinion on general medical studies rather than the particular circumstances of claimant's case. Rather, Dr. Rasmussen considered the possible etiologies of claimant's disabling respiratory impairment, including coal dust exposure and cigarette smoking, and explained, with references to the objective evidence, why he believed that claimant was totally disabled as a result of both exposures. Director's Exhibit 21. Moreover, since Dr. Rasmussen specifically attributed claimant's disabling respiratory condition to both coal dust exposure and smoking, we reject employer's contention that Dr. Rasmussen's opinion is legally insufficient to support claimant's burden of proof at 20 C.F.R. §718.204(c). 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross*, 23 BLR at 1-18; *Trumbo v. Reading Anthracite Co.*, 17 BLR at 1-90 (1993).

Thus, because the administrative law judge, as the trier of fact, rationally exercised his discretion in reaching his credibility determinations, *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997), we affirm, as supported by substantial evidence, his reliance on Dr. Rasmussen's opinion to find that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Gross*, 23 BLR at 1-18; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Thus, 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge