BRB No. 10-0364 BLA

RICHARD E. TOY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARPENTERTOWN COAL & COKE COMPANY	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	DATE ISSUED: 03/30/2011
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Christopher L. Wildfire (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennyslvania, for employer/carrier.

Maia S. Fisher (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 (2008-BLA-5691) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed on June 25, 2007, 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). The administrative law judge accepted the parties' stipulation of twenty-eight years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of legal pneumoconiosis at 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, benefits were awarded.

Employer appeals, asserting that the administrative law judge erred in weighing the medical opinions as to the etiology of claimant's chronic obstructive pulmonary disease (COPD) and his respiratory disability. Claimant responds, urging affirmance of the award of benefits. Claimant asserts, however, that if the Board vacates the case for any reason, the administrative law judge must be instructed to consider whether claimant is entitled to benefits based on the recent amendments to the Act.[1] The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not file a substantive response to employer's arguments on appeal. The Director, however, also contends that the recent amendments to the Act apply to this case. Employer has filed a reply brief, requesting that, if the case is remanded, the Board instruct the administrative law judge to reopen the record to allow the parties to submit evidence in response to the recent changes in the law.

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

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

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 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, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer contends on appeal that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis. Pursuant to 20 C.F.R. 718.202(a)(4), the administrative law judge considered five medical opinions. Drs. Rasmussen and Celko opined that claimant has disabling COPD/emphysema caused by smoking and coal dust exposure. Director's Exhibit 14; Claimant's Exhibit 4. Dr. Begley opined that claimant has chronic bronchitis and moderate obstructive lung disease caused, in part, by coal dust exposure. Claimant's Exhibit 5. In contrast, Drs. Fino and Kaplan opined that claimant's disabling COPD is due entirely to smoking. Director's Exhibit 14; Employer's Exhibits 2, 4. In weighing the conflicting evidence, the administrative law judge determined that Dr. Begley's opinion was not sufficiently reasoned. Decision and Order at 12. The administrative law judge gave determinative weight to the opinions of Drs. Rasmussen and Celko, over the opinions of Drs. Fino and Kaplan, and found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. at 13-14.

Employer argues that Dr. Celko did not explain why he attributed claimant's disabling obstructive respiratory condition to coal dust exposure. Therefore, employer contends that the administrative law judge erred in crediting Dr. Celko's opinion as to the existence of legal pneumoconiosis. We disagree. As noted by the administrative law judge, Dr. Celko diagnosed that claimant has COPD (centrilobular emphysema), based on the results of the pulmonary function testing, which showed a fixed pattern of obstructive respiratory impairment. Decision and Order at 11; Director's Exhibit 14. Dr. Celko indicated that both smoking and coal dust exposure cause centrilobular emphysema and the type of fixed obstructive respiratory impairment demonstrated in this case. Director's Exhibit 14. Taking into consideration claimant's smoking and work histories, Dr. Celko

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States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

opined that, while claimant's forty-five year smoking history was the more significant cause of his disabling COPD, claimant's twenty-six years of coal dust exposure was a "substantial secondary" cause of his respiratory condition. *Id*. Thus, contrary to employer's argument, because Dr. Celko explained the basis for his causation opinion, and the administrative law judge determined that Dr. Celko's opinion was reasoned and documented, we affirm the administrative law judge's decision to credit Dr. Celko's opinion at 20 C.F.R. §718.202(a)(4), as supportive of a finding that claimant has legal pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 11.

We also reject employer's assertion that Dr. Rasmussen's opinion is legally insufficient to support claimant's burden of proving the existence of legal pneumoconiosis because Dr. Rasmussen indicated that he could not differentiate between an impairment caused by smoking versus an impairment caused by coal dust exposure.[3] *See Boness v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). As noted by the administrative law judge, Dr. Rasmussen based his opinion regarding the etiology of claimant's disabling COPD on relevant medical literature, the evidence presented in this case, "as well as on an accurate record of [claimant's] employment and smoking histories." Decision and Order at 11; *see* Claimant's Exhibit 4. Dr. Rasmussen explained that he attributed claimant's impairment to both smoking and coal dust exposure because they cause identical types of obstructive impairment. Claimant's Exhibit 4. He also noted that he considered claimant to be susceptible to significant lung disease by both factors, based on his exposure histories. *Id*. Because Dr. Rasmussen specifically opined that pneumoconiosis was a substantial contributor to claimant's respiratory condition, and the administrative law judge permissibly determined that Dr. Rasmussen's opinion is reasoned and documented, we affirm the administrative law judge's decision to rely on Dr. Rasmussen's opinion to find that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Williams*, 114 F.3d at 25, 21 BLR at 2-111; *Clark*, 12 BLR at 1-151.

Furthermore, there is no merit to employer's assertion that the administrative law judge erred in rejecting Dr. Kaplan's opinion that smoking was the sole factor in claimant's respiratory condition. The administrative law judge correctly found that Dr. Kaplan did not specifically explain why he excluded coal dust exposure as a causative

[3] Dr. Rasmussen stated that the "mechanisms by which [cigarette smoking and coal mine dust inhalations] damage the lungs . . . is identical and it is not possible by physical, physiologic, radiographic or even anatomical means to separate the effects of smoking from those of coal mine dust." Claimant's Exhibit 7.

factor for claimant's COPD, other than to make "a general finding . . . that smoking is the cause of obstructive lung disease in any patient with a history of cigarette smoking and with an x-ray reading that is negative for pneumoconiosis." Decision and Order at 12. As noted by the administrative law judge, however, Dr. Kaplan's opinion is contrary to the position of the Department of Labor, that coal dust exposure causes obstructive respiratory impairment, and that a miner may have legal pneumoconiosis even in the absence of positive x-ray evidence for clinical pneumoconiosis. *Id.*, *citing* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000). Thus, we affirm the administrative law judge's finding that Dr. Kaplan's opinion is not sufficiently reasoned, and is entitled to little weight. *See Williams*, 114 F.3d at 25, 21 BLR at 2-111; *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); *Clark*, 12 BLR at 151.

Employer further contends that the administrative law judge erred in rejecting Dr. Fino's explanation that claimant's respiratory condition is unrelated to coal dust exposure based on the variability of the pulmonary function test results. We disagree. As noted by the administrative law judge, Dr. Fino ruled out coal dust exposure as the cause of the miner's disabling respiratory condition because he believed that the pulmonary function study evidence between July 2007 and November 2008 showed a "rapid change in lung function" that was inconsistent with an impairment related to coal dust exposure, which he described as being fixed and irreversible. Decision and Order at 13. In his written report, Dr. Fino indicated that the pulmonary function tests, performed on July 17, 2007 and February 8, 2008, were normal. Employer's Exhibit 4. Dr. Fino opined that the pulmonary function test he obtained in conjunction with his own examination of claimant, on November 20, 2008, was invalid. *Id*. During his deposition, Dr. Fino testified that subsequent pulmonary function tests, conducted on November 24, 2008 and November 26, 2008, showed a severe obstructive and restrictive respiratory impairment.[4] Employer's Exhibit 8. According to Dr. Fino, the pulmonary function tests would not have gone from normal to very abnormal between February 2008 and November 2008, if claimant's respiratory condition was due to coal dust exposure. *Id*.

The administrative law judge, however, properly determined that Dr. Fino's causation opinion was not credible because it was based on "an incorrect finding that [claimant] did not have an impairment in February 2008." Decision and Order at 13. In support of this determination, the administrative law judge noted, correctly, that Dr. Kaplan specifically opined that the pulmonary function test he conducted on February 8,

[4] The administrative law judge determined that four out of the five pulmonary function studies were qualifying for total disability. Decision and Order at 14; Director's Exhibit 14; Claimant's Exhibits 4, 5; Employer's Exhibit 4. Specifically, only the February 8, 2008 pulmonary function test was non-qualifying. Director's Exhibit 15.

2008 revealed obstructive lung disease, contrary to Dr. Fino's conclusion that the testing was normal. Decision and Order at 13. Moreover, the administrative law judge properly found that Dr. Fino failed to address the fact that the July 17, 2007 pulmonary function test was qualifying for total disability under the regulations. *Id*. Additionally, the administrative law judge noted that it was "difficult to determine[,] based on Dr. Fino's testimony[,] whether the variance in [claimant's] pulmonary function test [results are] statistically significant."[5] *Id*. Thus, the administrative law judge found that Dr. Fino's conclusions, regarding the significance in the variance of the pulmonary function tests, were not sufficiently explained and that his opinion, overall, was not reasoned as to the cause of claimant's obstructive respiratory disease. *Id*. at 14.

Because the administrative law judge has rationally explained why Dr. Fino's opinion is not credible as to the etiology of claimant's disabling COPD, we affirm his decision to accord Dr. Fino's opinion less weight at 20 C.F.R. §718.202(a)(4). *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), Therefore, we affirm the administrative law judge's finding, based on the opinions of Drs. Celko and Rasmussen, that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 14. We also affirm, as supported by substantial evidence, the administrative law judge's overall finding, based on his consideration of all of the medical evidence, that claimant has met his burden to establish that he has "COPD caused in significant part by coal mine employment." Decision and Order at 14; *see Williams*, 114 F.3d at 25; 21 BLR at 2-112.

Employer's final argument is that the administrative law judge erred in finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted the opinions of Drs. Kaplan and Fino, as to the cause of claimant's respiratory disability, because they did not diagnose either clinical or legal pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 (2002) (*en banc*); Decision and Order at 15-16. Moreover, as explained *supra*, the administrative law judge permissibly found the opinions of Drs. Celko and Rasmussen to be reasoned and documented and sufficient to

[5] The administrative law judge noted that, while Dr. Fino indicated that an individual's pulmonary function testing may vary from one day to the next by eight percent, "Dr. Fino did not cite to any medical authority for this figure, and he did not indicate whether any variance beyond eight percent is necessarily significant." Decision and Order at 13.

establish that claimant's respiratory disability is due, at least in part, to coal dust exposure. Decision and Order at 16. Thus, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[6] *See Bonessa*, 884 F.2d at 734, 13 BLR at 2-37.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[6] In light of our affirmance of the award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).