BRB No. 10-0392 BLA

GERALD A. HUNT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 03/25/2011
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Douglas A. Smoot and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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-5706) of Administrative Law Judge Daniel L. Leland on a subsequent claim filed on July 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).[1] After crediting claimant with twenty-nine years and two months of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), (2), but sufficient to establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). The administrative law judge concluded, therefore, that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). The administrative law judge adjudicated the claim on the merits and found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(4), that he is totally disabled pursuant to 20 C.F.R. §718.204(b) and that his disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the weight of 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. Employer further contends that the administrative law judge erred in finding that claimant proved that he is totally disabled due to pneumoconiosis at 20 C.F.R. §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 award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief in response to employer's appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in

[1] Claimant filed his initial claim for benefits on September 28, 1999, which was denied by Administrative Law Judge Michael P. Lesniak in a Decision and Order - Denying Benefits dated June 4, 2002. Director's Exhibit 1. Judge Lesniak found that claimant was totally disabled, but that claimant did not establish the existence of pneumoconiosis. Consequently, benefits were denied. *Id*. No further action was taken until claimant filed his current subsequent claim.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-nine years and two months of coal mine employment and his determination that claimant established total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

accordance with applicable law.[3] 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).

Impact of the Recent Amendments

By Order dated June 4, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), which amended the Act with respect to the entitlement criteria for certain claims.[4] The Director and employer have responded.

The Director asserts that, although Section 1556 is applicable because claimant's subsequent claim was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits. Employer agrees that Section 1556 is applicable to this claim, based on the filing date. To determine whether this case must be remanded for consideration of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we will first address employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(c).

Merits of Entitlement

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore &*

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] 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).

Sons, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Subsequent Claim

When 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 the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *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). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

Legal Pneumoconiosis

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Rasmussen, Saludes, Schaaf, Repsher and Renn. Drs. Rasmussen, Saludes and Schaaf diagnosed legal pneumoconiosis,[5] opining that claimant suffered from chronic obstructive pulmonary disease (COPD)/emphysema, due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 11; Claimant's Exhibits 1, 2; Employer's Exhibit 12. Drs. Repsher and Renn diagnosed cigarette smoking-induced emphysema, bronchitis and asthma. Employer's Exhibits 1, 4, 11, 14. Drs. Repsher and Renn opined that claimant's coal mine dust exposure did not contribute to his emphysema or his asthma. *Id.*

The administrative law judge credited Dr. Rasmussen's opinion, that coal dust exposure was a material contributor to claimant's COPD/emphysema, based on the doctor's explanation that coal mine dust exposure and cigarette smoking cause identical forms of emphysema. Decision and Order at 8. The administrative law judge found that Dr. Rasmussen's opinion was well-reasoned and supported by the scientific view adopted by the Department of Labor (DOL) in the preamble to the amended regulations. *Id.*

[5] 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).

Regarding Dr. Saludes's opinion, the administrative law judge determined that he diagnosed legal pneumoconiosis, based on claimant's history of coal mine employment, symptoms of dyspnea on exertion, chronic coughing and wheezing and pulmonary function studies showing severe obstructive lung disease. *Id.* at 9. The administrative law judge acknowledged that Dr. Saludes stated that it was not possible to distinguish between an obstructive impairment caused by cigarette smoking and one caused by coal mine dust exposure and found that Dr. Saludes's opinion, that coal dust exposure was a substantial contributor to claimant's COPD/emphysema, was documented and well-reasoned. *Id.* The administrative law judge determined that Dr. Schaaf's opinion, identifying both coal dust exposure and smoking as significant contributing factors to claimant's COPD and chronic bronchitis, was documented and well-reasoned, consistent with the preamble to the regulations and entitled to significant weight. *Id.*

In contrast, the administrative law judge discredited the opinions in which Drs. Repsher and Renn found that claimant does not have legal pneumoconiosis. The administrative law judge determined that Dr. Repsher's opinion was not well-reasoned because it was based on statistical probabilities, rather than data specific to claimant. Decision and Order at 8. The administrative law judge further found that Dr. Repsher's assertion, that coal dust-related lung disease does not cause a clinically significant pulmonary impairment, is contrary to the scientific view adopted by the DOL in the preamble to the amended regulations. *Id.* The administrative law judge also gave little weight to Dr. Repsher's statement, that the results of claimant's pulmonary function studies are inconsistent with studies establishing that exposure to coal dust causes a proportional decrease in the FEV1 and FVC, because it was based on unidentified NIOSH criteria from 1995. *Id.* With respect to Dr. Renn's opinion, the administrative law judge determined that it was not reasoned, as Dr. Renn did not explain how he concluded that claimant's pulmonary disease was not significantly related to his coal mine dust exposure. *Id.* at 9. Based on his weighing of the opinions of Drs. Rasmussen, Saludes, Schaaf, Repsher and Renn, the administrative law judge found that the newly developed medical opinion evidence was sufficient to establish that the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4) and, therefore, a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Decision and Order at 9. The administrative law judge further found, based on a weighing of all relevant evidence, that claimant established the existence of legal pneumoconiosis on the merits.[6]

[6] The administrative law judge noted that the record also contains medical opinion evidence submitted in connection with claimant's 1999 claim. However, the administrative law judge reasonably relied upon the more recent medical opinions, which he found more accurately reflected claimant's current condition. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Wetzel*

In challenging the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 725.309(d), employer contends that the administrative law judge erred in finding that the opinions of Drs. Rasmussen, Saludes and Schaaf, attributing claimant's respiratory impairment to both coal mine employment and cigarette smoking, supported a finding of legal pneumoconiosis. Employer argues that the "speculative opinions of Drs. Rasmussen, Saludes and Schaaf" are not sufficient to satisfy claimant's "burden of proof absent the improper presumption of legal pneumoconiosis." Employer's Brief at 23. Employer maintains that the administrative law judge provided claimant with an impermissible presumption that his COPD arose from his coal mine dust exposure because Drs. Rasmussen, Saludes and Schaaf "believed there is no way to differentiate between the effect of coal dust and cigarette smoking on [claimant's] lung function." *Id*. Employer alleges that the failure of Drs. Rasmussen, Saludes and Schaaf to distinguish between the effects of claimant's exposure to cigarette smoke and coal mine dust renders their opinions speculative. *Id*. at 20.

These arguments are without merit. The administrative law judge acted within his discretion as fact-finder in determining that the opinions of Drs. Rasmussen, Saludes and Schaaf were well-reasoned and documented, as they set forth the rationale for their findings, identified the medical evidence of record on which they based their diagnoses, and explained why they concluded that claimant's disabling COPD/emphysema was due to both smoking and coal dust exposure. 20 C.F.R. §718.201(a)(2), (b); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). In addition, the administrative law judge rationally determined that the fact that the physicians did not apportion a specific percentage of claimant's pulmonary condition to coal dust exposure did not detract from the probative value of their opinions, as each physician concluded that claimant's COPD/emphysema was significantly related to coal dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004). Accordingly, we affirm the administrative law judge's finding that the opinions of Drs. Rasmussen, Saludes and Schaaf, were sufficient to satisfy claimant's burden of proving the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

We also reject employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Repsher and Renn. The administrative law judge rationally found that the probative value of Dr. Repsher's opinion was diminished because he relied on what he characterized as the low statistical probability that coal dust

---

v. Director, OWCP, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 9.

exposure causes clinically significant obstructive impairment, rather than on the objective data in this case demonstrating that claimant has a disabling obstructive impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge also acted within his discretion in determining that Dr. Repsher's assertion, that coal dust-related lung disease does not cause a clinically significant pulmonary impairment, is contrary to the view endorsed by the DOL in the preamble to the regulations and, therefore, entitled to little weight. *See Sewell Coal Co. v. Triplett*, 253 F. App'x 274, 277 (4th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Freeman United Coal Mining v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Furthermore, the administrative law judge acted within his discretion in finding that the opinions of both Drs. Repsher and Renn were not well-reasoned, as they did not adequately explain why claimant's twenty-nine years and two months of coal dust exposure was not a contributing cause of his COPD. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276. The administrative law judge, therefore, properly gave less weight to the opinions of Drs. Repsher and Renn than to the opinions of Drs. Rasmussen, Saludes and Schaaf.[7]

Accordingly, we affirm the administrative law judge's credibility determinations under 20 C.F.R. §718.202(a)(4), and his finding that claimant established the existence of legal pneumoconiosis, in the form of COPD arising out of coal mine employment.[8] In light of our affirmance of the administrative law judge's determination pursuant to 20 C.F.R. 718.202(a)(4), we also affirm the administrative law judge's finding that claimant demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *White*, 23 BLR at 1-3. Lastly, we affirm the administrative law judge's finding, based on a consideration of all of the evidence of record, that claimant

[7] We decline to address whether the administrative law judge rationally found that Dr. Repsher's statement, that the prevailing medical view is that coal dust exposure causes a proportional decrease in the FEV1 and FVC, is based solely on unidentified NIOSH criteria from 1995 and is entitled, therefore, to little weight. Decision and Order at 8. Because the administrative law judge has provided valid alternative rationales for discrediting Dr. Repsher's opinion, error, if any, in considering this particular statement is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as it is subsumed in his finding at 20 C.F.R. §718.202(a)(4). *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that claimant established that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's contention lacks merit. The administrative law judge rationally discounted the opinions of Drs. Repsher and Renn because they did not diagnose legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Moreover, the administrative law judge acted within his discretion in finding that the opinions of Drs. Rasmussen, Saludes and Schaaf were sufficient to establish that claimant is totally disabled due to legal pneumoconiosis, based upon his rational credibility determinations at 20 C.F.R. §718.202(a)(4). Consequently, 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) and the award of benefits. In light of our affirmance of the award of benefits, we hold that remand for consideration under the amended version of Section 411(c)(4), 30 U.S.C. §921(c)(4), is not necessary, as its application would not affect the outcome of this case.

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