BRB No. 11-0418 BLA

VIRGIL T. BRIGANCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/26/2012
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Second Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Elizabeth Ashley Bruce, Greenville, Kentucky, for claimant.

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

Michelle Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Second Remand – Award of Benefits (2004-BLA-5249) of Administrative Law Judge Larry S. Merck rendered on a claim filed on November 1, 2001, 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). This case is before the Board for the third time. Initially, Administrative Law Judge Daniel J. Roketenetz found that the instant claim was timely filed pursuant to Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a). Judge Roketenetz credited claimant with twenty years of coal mine employment based on the parties' stipulation and, considering the merits of the claim under 20 C.F.R. Part 718, found that the medical opinion evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, he awarded benefits.

Employer appealed the award of benefits. The Board affirmed Judge Roketenetz's determination that the claim was timely filed. The Board held that claimant's "mere statement" that he was told by doctors that he was totally disabled due to pneumoconiosis, without evidence in the record of a reasoned opinion by a doctor, was insufficient to trigger the running of the statute of limitations.[1] *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006) (en banc); *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001). Turning to the merits of the case, the Board affirmed Judge Roketenetz's finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but vacated the award of benefits and remanded the case for further consideration of the medical evidence relevant to the issues of clinical and legal pneumoconiosis, as well as disability causation pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). *Brigance*, 23 BLR at 1-175, 1-179-80.

[1] Claims for black lung benefits are presumptively timely. 20 C.F.R. §725.308(c). In order to be timely, a claim must have been filed before three years after a medical determination of total disability due to pneumoconiosis is communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Accordingly, it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to the miner" more than three years prior to the filing of his/her claim. *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001).

On first remand, Administrative Law Judge Larry S. Merck (the administrative law judge)[2] found that, while the medical opinion evidence failed to establish clinical pneumoconiosis, it established legal pneumoconiosis pursuant to Section 718.202(a)(4),[3] and it established disability causation pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer again appealed. The Board held that its previous determination that the claim was timely filed, and that the evidence established total respiratory disability pursuant to Section 718.204(b)(2), constituted the law of the case. The Board, therefore, declined to revisit these issues. Regarding the issue of legal pneumoconiosis, however, the Board vacated the administrative law judge's finding of legal pneumoconiosis. The Board instructed the administrative law judge to fully explain, on remand, how Dr. Simpao's "apparent" reliance on a positive x-ray supported his diagnosis that claimant's respiratory impairment arose out of coal mine employment. The Board also instructed the administrative law judge to explain how Dr. Simpao's finding of a "permanent" impairment met the regulatory requirement of a "chronic lung disease or impairment and its *sequelae* arising out of coal mine employment," in order to establish legal pneumoconiosis. Next, the Board instructed the administrative law judge to determine whether Dr. Repsher provided a credible rationale for his opinion that claimant's coal mine employment played no role in his respiratory impairment. The Board also instructed the administrative law judge to fully consider the specifics of Dr. Fino's opinion and his rationale for concluding that claimant's respiratory impairment was due entirely to his smoking history. In light of the foregoing, the Board also vacated the administrative law judge's disability causation finding pursuant to 20 C.F.R. §718.204(c), as it was based on his credibility determinations pursuant to Section 718.202(a)(4), and instructed the administrative law judge to consider all relevant evidence and fully explain his conclusions on the issue of disability causation, if reached. *V.B.* [*Brigance*] *v. Peabody Coal Co*., BRB No. 08-0480 BLA (Mar. 30, 2009)(unpub.).

On second remand, the administrative law judge reconsidered the medical opinions respecting the issues of legal pneumoconiosis and disability causation pursuant

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[2] Prior to the decision on remand, Administrative Law Judge Daniel J. Roketenetz retired from the Office of Administrative Law Judges. The case was therefore transferred to Administrative Law Judge Larry S. Merck (the administrative law judge).

[3] "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); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

to Sections 718.202(a)(4) and 718.204(c). The administrative law judge assigned determinative weight to the opinion of Dr. Simpao on these issues, as he found it to be the best reasoned and documented opinion of record. The administrative law judge assigned less weight to the opinions of Drs. Repsher and Fino because they were not as well-reasoned and documented. The administrative law judge, therefore, found that Dr. Simpao's opinion established that claimant suffers from legal pneumoconiosis pursuant to Section 718.202(a)(4), and that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer argues that the Board erred in holding that the instant claim was timely filed, and argues that the Board should revisit this issue in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280 (4th Cir. 2011), *aff'g* 43 BRBS 179 (2010). Additionally, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(c), and, therefore, erred in finding the existence of legal pneumoconiosis and disability causation established thereunder. Employer asserts that the administrative law judge's "decision on remand is not meaningfully different from his [previously] rejected opinion," that he selectively analyzed the evidence, and that the decision fails to comply with the Board's instructions on remand. Employer's Brief at 13. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response limited to the timeliness issue. The Director argues that inasmuch as the Board has previously addressed the issue, the Board's holding is the law of the case and the Board need not revisit the issue. The Director also contends that employer's reliance on the decision of the Fourth Circuit in *Wheeler* is inapposite and meritless. In reply, employer reiterates its contentions on appeal.

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).

Timeliness of the Claim

We reject employer's argument that the Board's interpretation of the timeliness provision at 20 C.F.R §725.308(a) is erroneous. As the Director points out, the Board has

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 3.

previously held that employer failed to prove that the claim was untimely filed, and has rejected employer's request to reconsider that holding based on the law of the case doctrine. *V.B.* [*Brigance*], slip op at 4. Accordingly, we will not revisit the issue in this appeal. *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2006). Further, as the Director contends, the decision of the Fourth Circuit in *Wheeler*, is neither apposite nor controlling in this Sixth Circuit case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Legal Pneumoconiosis

In finding legal pneumoconiosis established at Section 718.202(a)(4), the administrative law judge determined that Dr. Simpao provided a well-reasoned and well-documented opinion that claimant suffers from a respiratory impairment that is related to his coal mine employment. In contrast, the administrative law judge determined that the contrary opinions of Drs. Fino and Repsher, attributing claimant's respiratory impairment entirely to smoking, were not well-reasoned or well-documented, and he assigned them little weight.

Contrary to employer's argument, the administrative law judge did not err in determining that Dr. Simpao provided a credible diagnosis of legal pneumoconiosis which was not tainted by his reference to a discredited x-ray reading. The administrative law judge reasonably determined that Dr. Simpao referenced the x-ray in support of his diagnosis of clinical pneumoconiosis and that "Dr. Simpao relied on other objective evidence when diagnosing [c]laimant with legal pneumoconiosis." Decision and Order at 7. The administrative law judge stated that Dr. Simpao "listed the 'pulmonary function test along with physical findings and symptomatology' as objective evidence for his finding of a lung disease that arose out of [c]laimant's coal mine employment."[5] *Id*. quoting Director's Exhibit 11 at 6.

It is for the administrative law judge to assess the medical evidence and evaluate whether sufficient documentation supports a medical diagnosis. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 355, 22 BLR 2-472, 2-481-82 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). In this case, as the administrative law judge noted, Dr. Simpao explained how the results of claimant's pulmonary function studies, his symptoms, and the findings on his physical

[5] Dr. Simpao replied in the affirmative to the question: "Based on your examination, does the miner have an occupational lung disease which was caused by his coal mine employment?" He indicated that the basis for his diagnosis is "findings on the x-ray, and pulmonary function test along with physical findings and symptomatology." Director's Exhibit 11 at 6.

examination supported his finding that claimant's respiratory impairment arose out of coal mine employment. Therefore, the administrative law judge reasonably inferred that Dr. Simpao's opinion, that claimant's respiratory impairment arose out of coal mine employment, was, in fact, based on his consideration of claimant's pulmonary function studies, symptomatology and physical examination findings, and not claimant's positive x-ray.[6]

Next, employer argues that the administrative law judge improperly interpreted Dr. Simpao's finding of a *mild* respiratory impairment as a finding of a *chronic* respiratory or pulmonary impairment.[7] Employer's Brief at 14-15. When asked on Form CM-988, "[i]f the patient has a *chronic* respiratory or pulmonary impairment," state the "degree of severity of the impairment…[,]" Dr. Simpao responded that claimant has a "mild impairment." Director's Exhibit 11. Inasmuch as the question asked on Form CM-988 regards a *chronic* respiratory impairment, the administrative law judge permissibly inferred that Dr. Simpao's response, that claimant has a *mild* impairment, reflected a belief that claimant's *mild* impairment is *chronic*. *See* Director's Exhibit 11 at 4. Accordingly, in light of the question asked, and Dr. Simpao's response, the administrative law judge permissibly inferred that Dr. Simpao opined that claimant had the chronic respiratory impairment necessary to establish the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Barrett*, 478 F.3d at 355, 22 BLR at 2-481-82; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer also asserts that the administrative law judge erred in interpreting "[Dr. Simpao's] statement that [claimant's] multiple years of coal dust exposure [were] 'medically significant,'" as a statement establishing that claimant's respiratory impairment arose out of coal mine employment. Employer's Brief at 14. We disagree.

Having diagnosed a respiratory impairment, when asked to identify the etiology of the diagnosis, Dr. Simpao responded that, "multiple years of coal dust exposure [are]

[6] As the administrative law judge found, Dr. Simpao's reference to the positive x-ray was used by the doctor as support for his finding that claimant has clinical pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Director's Exhibit 11 at 6.

[7] In its previous Decision and Order, the Board instructed the administrative law judge to explain how Dr. Simpao's finding of a "permanent impairment," met the definition of a *chronic* respiratory impairment pursuant to Section 718.201(a)(2). As employer contends, however, Dr. Simpao did not diagnose a "permanent" impairment. Employer's Brief at 13; Director's Exhibit 11. Rather, he diagnosed a "mild" impairment. Employer's Brief at 14; Director's Exhibit 11.

medically significant in [claimant's] [respiratory] impairment." Director's Exhibit 11 at 4. From this question and answer, the administrative law judge permissibly inferred that Dr. Simpao's statement constituted a belief that claimant's respiratory impairment arose out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Barrett*, 478 F.3d at 355, 22 BLR at 2-481-82; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Director's Exhibit 11 at 4; Employer's Brief at 14-15. Because the administrative law judge can draw reasonable inferences from the medical opinion evidence, we affirm his finding that Dr. Simpao's opinion was sufficient to establish the existence of legal pneumoconiosis. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer additionally asserts that the administrative law judge violated 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), by relying on the preamble to the amended regulations in weighing the medical opinions relevant to the issue of legal pneumoconiosis. Employer alleges that this is error because, unlike the regulations, the preamble was not subject to notice and comment, and it is not binding on the Department of Labor (DOL). Employer's assertion is without merit.

The preamble to the amended regulations sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). An administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble to the amended regulations. *See Beeler*, 521 F.3d at 723, 24 BLR at 2-97; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). In this case, the administrative law judge properly recognized, in light of the preamble to the amended regulations, that Dr. Repsher's diagnoses of chronic bronchitis and bullous emphysema could constitute legal pneumoconiosis if they are significantly related to, or substantially aggravated by, claimant's coal dust exposure. *See* 20 C.F.R. §718.201(b); *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 10; Employer' Exhibit 1. Thus, we reject employer's assertion that the administrative law judge violated the APA or selectively evaluated the evidence by relying on the preamble to the amended regulations in weighing the medical opinion evidence of legal pneumoconiosis.

Further, the administrative law judge recognized the DOL's approval of scientific evidence demonstrating that bronchitis and emphysema may be caused by coal mine dust

exposure, that both coal mine dust-induced and cigarette-smoke-induced obstructive impairments occur through similar mechanisms, and that coal dust and smoking have additive affects. *See* 65 Fed. Reg. 79,940-943 (Dec. 20, 2000); *Obush*, 24 BLR at 1-125-26; *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-292 n.7 (7th Cir. 2001); Decision and Order at 10. The administrative law judge, therefore, properly accorded less weight to Dr. Repsher's opinion because he failed to address whether claimant's respiratory impairment was significantly related to, or substantially aggravated by, coal mine dust exposure, s*ee Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994), and to explain why he eliminated the lengthy coal mine employment history as a cause of the miner's chronic bronchitis and bullous emphysema, *see Obush*, 24 BLR at 1-125-26; *see also Barrett*, 487 F.3d at 355, 23 BLR at 2-481-82. Consequently, the administrative law judge properly found that Dr. Repsher's opinion warranted "little weight" as it was not reasoned on the issue of the etiology of claimant's chronic bronchitis and emphysema. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-481-82; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 10.

Similarly, the administrative law judge acted within his discretion in according less weight to Dr. Fino's diagnosis of a moderate airway obstruction due solely to smoking. Decision and Order at 11-13. The administrative law judge rationally found Dr. Fino's view, that twenty years of coal mine employment was insufficient to cause a "clinically significant" loss in FEV_1 on pulmonary function study testing, "at odds" with the DOL's determinations regarding coal dust exposure and obstructive lung disease. *Id*. at 12; Employer's Exhibit 2; Dr. Fino Suppl. Report dated Feb. 7, 2005, at 4; *see* Fed. Reg. at 79,940 (Dec. 20, 2000); *see also Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, they are affirmed. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-481-82; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[8]

Disability Causation

Pursuant to Section 718.204(c), the administrative law judge found that the evidence established that claimant's totally disabling respiratory impairment is due to coal mine employment, based upon Dr. Simpao's well-reasoned and well-documented

[8] In view of the administrative law judge's finding of legal pneumoconiosis, he was not required to make a separate finding regarding the etiology of claimant's pneumoconiosis, pursuant to 20 C.F.R. §718.203. *See Henley*, 21 BLR at 1-151.

opinion, attributing claimant's disability to his coal mine employment. Decision and Order at 8, 14. The administrative law judge properly found that because the opinions of Drs. Repsher and Fino, on the existence of legal pneumoconiosis, were unreasoned, they were entitled to little weight on the issue of disability causation, as they did not, contrary to his own finding, diagnose the existence of legal pneumoconiosis. Decision and Order at 14; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 185-86 (6th Cir. 1997); *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, 826, 13 BLR 2-52, 63-64 (6th Cir. 1989). Therefore, we affirm the administrative law judge's finding that the evidence establishes that claimant is totally disabled due to his coal mine employment pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Second Remand - Award of 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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REGINA C. McGRANERY
Administrative Appeals Judge