BRB No. 03-0530 BLA

| | | |
|---|---|---|
| ROBERT J. DAMRON | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| WESTMORELAND COAL COMPANY | ) | |
| | ) | DATE ISSUED: 05/28/2004 |
| 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Timothy S. Williams (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2002-BLA-0244) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed 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).[1] The administrative law judge accepted the stipulation of the parties that claimant had at least thirty-nine years of qualifying coal mine employment, and adjudicated claimant=s request for modification of the prior denials of this claim, filed on March 25, 1993, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant demonstrated a change in conditions as the weight of the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(4), an element of entitlement previously adjudicated against claimant. Weighing all of the evidence of record, 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)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. '718.204(b), (c). Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. '725.310 (2000) and awarded benefits.

On appeal, employer challenges the administrative law judge=s retroactive application of the amended regulations to this claim, his decision to admit Claimant=s Exhibit 3 into the record and to exclude portions of Employer=s Exhibits 1-10 from the record, his finding of a change in condition pursuant to Section 725.310 (2000) based on a finding of pneumoconiosis pursuant to Section 718.202(a)(4), his finding of disability causation pursuant to Section 718.204(c), and his determination of the date from which benefits are payable pursuant to 20 C.F.R. '725.503(b). Claimant responds, urging affirmance. The Director, Office of Workers= Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer=s arguments regarding retroactive applicability of the amended regulations, the circumstances under which a consultative opinion may be credited, and the validity of Section 725.503(b). Employer has filed a reply brief to each response, reiterating its arguments on appeal.

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be

---

[1]The Department of Labor (DOL) has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

disturbed. 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).

Turning first to the procedural issues, employer contends that the administrative law judge erred in admitting into the record Claimant=s Exhibit 3, consisting of Dr. Gogineni=s interpretations of x-rays dated April 12, 1999 and March 7, 2000, and Dr. Maloof=s interpretation of an x-ray dated May 18, 2001.[2] Employer asserts that this evidence was available when the claim was before the district director, but was not submitted until after the case was transferred to the Office of Administrative Law Judges, two days prior to the evidentiary deadline, and thus must be excluded under Section 725.456(d) (2000) in the absence of extraordinary circumstances. Employer also maintains that it never received claimant=s letter, dated October 10, 2002, which purportedly explained what extraordinary circumstances existed to justify the admission of this evidence, and employer argues that it must be provided with a copy of the letter and given the opportunity to respond. Employer=s arguments are without merit. A review of the record indicates that employer received claimant=s letter, as employer referenced it in employer=s letter to the administrative law judge dated October 18, 2002. Noting that employer had not submitted any evidence to the contrary, the administrative law judge acted within his discretion in accepting the explanation of claimant=s counsel that the x-ray reports at issue were contained within hospital medical records that had only recently been received and reviewed by counsel, and that counsel submitted the x-ray interpretations as soon as he was aware of them. Decision and Order at 3-4. Although the evidence was in existence when the case was pending before the district director, the administrative law judge found that it was not obtained by claimant during that time, and thus the administrative law judge permissibly admitted this evidence into the record in accordance with Section 725.456 (2000).[3] Decision and Order at 4; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Employer next argues that the administrative law judge erred in excluding portions of Employer=s Exhibits 1-10 from the record, as this evidence was submitted in response to the late evidence contained in Claimant=s Exhibit 4, and employer is not limited under Section 725.456(b)(3) (2000) as to the type of response it may make to claimant=s evidence.

---

[2]By letter dated October 10, 2001, claimant=s counsel agreed that the 1973 x-ray report of Dr. Pelaez contained in Claimant=s Exhibit 3 should be excluded from the record.

[3]Even assuming, *arguendo*, that this evidence should have been excluded from the record, any error in its admission would be harmless since the administrative law judge found that the weight of the x-ray evidence was negative for pneumoconiosis. Decision and Order at 26; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer additionally maintains that since claimant withdrew his objections to Employer=s Exhibits 1-4, the administrative law judge abused his discretion in excluding any portion of this evidence. Employer=s arguments lack merit. The administrative law judge acknowledged that claimant had withdrawn his objections to Employer=s Exhibits 1-4, *see* Decision and Order at 4, and a review of the Decision and Order reflects that he did not exclude any portion of this evidence from the record. With respect to Employer=s Exhibits 5-10, the administrative law judge agreed that employer had the right to rebuttal and to take such action as it considered appropriate in response to claimant=s late evidence, which consisted of a supplemental report dated September 19, 2002 from Dr. Cohen and x-ray rereadings of films dated April 12, 1999, March 7, 2000, and May 18, 2001. The administrative law judge, however, acted within his discretion in finding that those portions of the supplemental reports of Drs. Spagnolo, Chillag, Castle, Rosenberg, Fino and Louden which were not directly responsive to Claimant=s Exhibit 4 exceeded the scope of rebuttal and thus should be excluded, and that any further comment by these physicians regarding evidence previously submitted in compliance with the twenty-day rule should be excluded on the additional ground that it was unduly repetitious.[4] Decision and Order at 5, 13 n.9, 14 n.10, 16 n.11, 17 n.12, 19 n.13; *see* 5 U.S.C. ' 556(d); *see generally North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47 (1990).

We also reject employer=s contention that the administrative law judge erred in retroactively applying the amended regulations to this claim. Although employer asserts that the amendments alter the criteria under which claims are evaluated, impose new burdens on employer, affect the nature and interpretation of medical data, and represent a drastic change in the law such that retroactive application denies employer due process and is contrary to

---

[4]Employer notes that in reviewing the supplemental report of Dr. Spagnolo, the administrative law judge referenced Dr. Rosenberg when excluding portions of the report in footnote 13. Employer=s Brief at 42; *see* Decision and Order at 18-19. Contrary to employer=s arguments, however, a remand to the administrative law judge for clarification and explanation is not necessary, as the reference to Dr. Rosenberg rather than to Dr. Spagnolo was clearly a clerical error.

law, employer has not identified how any of the amended regulations, as applied, negatively affected employer. Further, the administrative law judge properly did not apply the exempted sections of the revised regulations, and only applied the sections of the newly revised versions of 20 C.F.R. Parts 718 and 725 that the United States Court of Appeals for the District of Columbia Circuit found not to be impermissibly retroactive in *Nat=l Mining Ass=n v. Dep=t of Labor*, 292 F.3d 849 (D.C. Cir. 2002), to the facts of the present case. Decision and Order at 20-21.

Turning to the merits, employer initially contends that the administrative law judge erred in finding pneumoconiosis established at Section 718.202(a)(4). Employer argues that the administrative law judge provided invalid reasons for discounting the opinions of its experts, Drs. Chillag, Loudon, Rosenberg, Fino, Crisalli, Spagnolo and Castle, and improperly relied on the consultative opinion of Dr. Cohen, which employer maintains was based primarily on positive x-rays and was uncorroborated by the opinion of an examining physician. Employer also maintains that the administrative law judge erred in failing to address and weigh the CT scan evidence of record with the medical opinion evidence at Section 718.202(a)(4) and when weighing all of the evidence under Section 718.202(a) together in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[5]

After considering the administrative law judge=s Decision and Order, the issues raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. While we agree that the administrative law judge should have addressed and weighed the CT scan evidence *de novo*, his failure to do so constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The CT scan evidence in question[6] was contained in the original record before Administrative Law Judge Richard E. Huddleston, who found the weight of this evidence

---

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director=s Exhibit 2.

[6]CT scans were taken on May 17, 1993 and March 23, 1994, and were interpreted as positive for both simple and complicated pneumoconiosis by Dr. Bassali, and as negative for pneumoconiosis by Drs. Fishman, Wheeler, Wiot, Reifsteck, McJunkin and Fino, whose findings included emphysema, granuloma, ill-defined linear densities, tumor and/or scarring suggestive of prior inflammatory disease such as tuberculosis. Director=s Exhibits 28, 31, 33, 35, 38, 40.

insufficient to establish the existence of simple or complicated pneumoconiosis in decisions issued on January 9, 1995 and April 11, 1997. Director=s Exhibits 45, 63. In denying modification, Administrative Law Judge Daniel L. Leland also considered the CT scan evidence and found it insufficient to establish the existence of simple or complicated pneumoconiosis in a Decision and Order issued on March 30, 1999, Director=s Exhibit 89, which was affirmed by the Board on April 19, 2000, Director=s Exhibit 96. Judge Lesniak, the administrative law judge herein, subsequently incorporated by reference the summaries of the medical evidence by Judges Huddleston and Leland, and found that both the earlier evidence and the newly submitted evidence was insufficient to establish the existence of clinical pneumoconiosis. Decision and Order at 6, 22, 26, 30. The administrative law judge then considered all of the relevant medical opinions of record, the respective qualifications of the physicians and the documentation and reasoning which formed the basis of their conclusions, and acted within his discretion as trier of fact in finding that the weight of this evidence established legal pneumoconiosis.[7] Decision and Order at 11-20, 27-30; *see Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Contrary to employer=s arguments, the administrative law judge reasonably determined that despite the impressive credentials of Drs. Chillag and Loudon, their opinions were less probative and thus were entitled to less weight than the opinions of the physicians who possessed the superior qualifications of Board-certification in both Internal Medicine and Pulmonary Disease, *i.e.*, Drs. Cohen, Fino, Castle, Rosenberg, Crisalli and Spagnolo. Decision and Order at 28; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge permissibly gave greater weight to the opinion of Dr. Cohen, as supported by the opinion of Dr. Rasmussen,[8]

---

[7]Contrary to employer=s arguments, the administrative law judge did not err in failing to discuss the qualifications of Drs. Fino, Castle, Crisalli and Spagnolo when weighing their opinions, as he acknowledged their credentials when summarizing their reports. *See* Decision and Order at 15, 17-18.

[8]Contrary to employer=s arguments, Dr. Cohen=s consultative opinion was not based primarily on positive x-rays; rather, the administrative law judge accurately noted that the physician stated he could not make a clear determination of the presence or absence of pneumoconiosis from the conflicting x-ray reports of record, but diagnosed a partially reversible obstructive ventilatory impairment due to smoking and coal dust exposure based on medical, employment and smoking histories, symptoms, pulmonary function testing, lung volume studies, diffusion impairment and gas exchange abnormalities with exercise. Decision and Order at 12-13, 28; Director=s Exhibit 97; Claimant=s Exhibit 4. We also reject employer=s argument that a consulting physician=s opinion cannot be credited unless it is corroborated by the opinion of an examining physician, as employer=s reliance on

as he found that it was well-reasoned and documented, and that the physician clearly and persuasively set forth his reasons for concluding that claimant=s partially reversible chronic obstructive pulmonary disease (COPD) was caused by both coal dust exposure and smoking. Decision and Order at 27-28; *see Collins*, 21 BLR 1-181; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge, within a proper exercise of his discretion, gave less weight to the contrary opinions of Drs. Fino and Castle, that claimant had asthma and an obstructive ventilatory abnormality due entirely to a twenty-five pack-year smoking history, because he found that these physicians failed to adequately explain how they were able to eliminate claimant=s approximately forty-three years of coal dust exposure as a possible contributing factor in light of the fact that claimant stopped smoking in 1976 but continued mining until 1993, and their reasoning was less persuasive than Dr. Cohen=s rebuttal. Decision and Order at 28-29; *see Clark*, 12 BLR 1-149; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Similarly, the administrative law judge rationally accorded less weight to the opinions of Dr. Crisalli, that claimant had emphysema secondary to smoking and asthma but no impairment attributable to coal mine employment, and Dr. Spagnolo, that claimant=s pulmonary condition was most consistent with smoking with no contribution or aggravation from coal dust exposure, because he found that these opinions were not as well-reasoned as that of Dr. Cohen: Dr. Crisalli failed to adequately explain how he was able to rule out coal dust exposure as a factor in the formation of asthma or emphysema when both conditions can be related to coal dust exposure, and Dr. Spagnolo failed to adequately explain how he was able to completely eliminate claimant=s significant

---

*Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984)[a non-examining physician=s opinion on matters not addressed by examining physicians is insufficient as a

matter of law to rebut an interim presumption under 20 C.F.R. Part 727], and *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993)[the testimony of a non-examining physician can be relied upon when it is consistent with the record], is misplaced. Further, Dr. Cohen=s conclusions were supported by the findings of the Occupational Pneumoconiosis Board and the opinions of Drs. Rasmussen, Treharne, and Ranavaya. Decision and Order at 28; Director=s Exhibits 12, 65, 82, Claimant=s Exhibit 1. The administrative law judge, however, accorded less weight to these supporting opinions because he found that Dr. Rasmussen failed to specifically identify what factors he considered in attributing claimant=s chronic obstructive pulmonary disease, at least in part, to his coal dust exposure; Dr. Treharne=s opinion, that claimant=s lung disease was most likely due to coal dust exposure and smoking, was equivocal; and Dr. Ranavaya and the Occupational Pneumoconiosis Board provided no rationale for finding a nexus between claimant=s pulmonary disease and his coal mine employment. *Id*.

coal dust exposure as a possible cause of claimant=s pulmonary dysfunction. Decision and Order at 29-30; *Clark*, 12 BLR 1-149. The administrative law judge, within his discretion, also found that the opinion of Dr. Rosenberg, that claimant=s disabling COPD was unrelated to coal dust exposure, was less persuasive and credible than Dr. Cohen=s opinion because Dr. Rosenberg, while acknowledging that coal dust exposure could cause COPD, concluded that severe disabling COPD did not occur in relationship to coal dust exposure in the absence of complicated pneumoconiosis. As coal dust exposure need not be the sole cause of a miner=s COPD in order for a physician to diagnose legal pneumoconiosis pursuant to 20 C.F.R. ' 718.201, the administrative law judge found it Ainappropriate for Dr. Rosenberg to use the absence of complicated pneumoconiosis as the sole criterion to exclude coal mine dust as a possible factor in causing the miner=s severe COPD,@ and consequently accorded the opinion less weight. Decision and Order at 29; *see Lucostic*, 8 BLR 1-46. The administrative law judge thus concluded that the weight of the evidence established legal pneumoconiosis pursuant to Section 718.202(a)(4), and we affirm this finding as supported by substantial evidence.

Considering the evidence of clinical and legal pneumoconiosis together, the administrative law judge permissibly found that the weight of the evidence established the existence of pneumoconiosis at Section 718.202(a), *see Compton*, 211 F.3d 203, 22 BLR 2-162, and a change in conditions at Section 725.310 (2000), *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Decision and Order at 30. The administrative law judge=s findings at Sections 718.202(a) and 725.310 are supported by substantial evidence, and are affirmed. We also affirm his findings that claimant is entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), with no rebuttal, as employer has identified no error therein on appeal, *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), and his finding that the record establishes total respiratory disability, as unchallenged on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also challenges the administrative law judge=s finding of disability causation at Section 718.204(c), arguing that the administrative law judge improperly relied on the opinion of Dr. Cohen that both coal dust exposure and smoking significantly contributed to claimant=s disabling impairment, and provided invalid reasons for discounting the contrary opinions of Drs. Castle, Rosenberg, Chillag, Fino and Spagnolo. Employer additionally asserts that the administrative law judge misapplied the holding in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), to the facts of this case, when *Toler* involved a finding of clinical rather than legal pneumoconiosis and did not require an administrative law judge to discount the opinions of physicians who did not diagnose pneumoconiosis when weighing the evidence on the issue of disability causation. Employer=s arguments are without merit. Because Drs. Castle, Rosenberg, Chillag, Fino and Spagnolo did not diagnose either clinical or legal pneumoconiosis, in direct contradiction to

the administrative law judge=s finding that claimant suffered from legal pneumoconiosis, the administrative law judge could give weight to those physicians= opinions only if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most. *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002). Based on his weighing of the evidence at Section 718.202(a)(4), the administrative law judge properly found disability causation established at Section 718.204(c), *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), and we affirm his findings thereunder as supported by substantial evidence.[9] Consequently, we affirm the award of benefits.

Lastly, employer contends that the administrative law judge erred in awarding benefits payable as of March 1, 2000, when claimant did not request modification until March 21, 2001. Employer maintains that even if the administrative law judge intended to award benefits from the date claimant requested modification, Section 725.503(b) is invalid insofar as it allows a claimant to receive benefits from the date of filing when there is no proof that he suffers from totally disabling pneumoconiosis at that time, thus improperly shifting the burden of proof and persuasion to employer. The Director, however, accurately notes that although the administrative law judge misidentified the date upon which claimant requested modification, the administrative law judge indicated that where, as here, a change in conditions has been established and the evidence does not establish the month of onset, benefits shall be payable from the month in which claimant requested modification. Decision and Order at 32; *see* 20 C.F.R. ' 725.503(d)(2). Since the administrative law judge awarded benefits based primarily on the opinion of Dr. Cohen, whose report dated February 20, 2001 was submitted in support of modification, the Director correctly maintains that Dr. Cohen=s opinion constitutes medical proof showing that claimant was totally disabled by pneumoconiosis arising out of coal mine employment at the time he filed his modification request. *See generally Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985). Consequently, we modify the Decision and Order to reflect that benefits are payable from March 1, 2001, the actual month in which claimant requested modification.

---

[9]As the administrative law judge properly gave less weight to the opinions of those physicians who did not diagnose pneumoconiosis, any error in his alternative reasons for discounting the opinions is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Accordingly, the administrative law judge=s Decision and Order - Awarding Benefits is modified in part as to the onset date and in all other aspects is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge