

BRB No. 06-0644 BLA

DONNA ELSWICK, o/b/o)
BENJAMIN W. STEPHENSON (Deceased))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 05/23/2007
)
UNION CARBIDE CORPORATION)
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan,
Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; 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, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (04-BLA-6309) of Administrative Law Judge Richard A. Morgan denying 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). The miner's prior application for benefits, filed on April 8, 1999, was finally denied on September 7, 1999 because the miner failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment.² Director's Exhibit 3. On September 12, 2002, the miner filed his current application, his fourth, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 5.

In a Decision and Order Denying Benefits issued on April 25, 2006, the administrative law judge credited the miner with at least thirteen and one-half years of coal mine employment³ and found that the medical evidence developed since the prior denial of benefits established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge determined that claimant met her burden to establish a change in one applicable condition of entitlement.⁴ 20 C.F.R. §725.309(d); *see Lisa Lee Mines v. Director, OWCP [Rutter]*,

¹ Claimant is the miner's daughter. The miner died on July 28, 2005, prior to the hearing on the current claim.

² The miner filed two additional prior applications for benefits. The miner's first claim, filed on May 19, 1986, was finally denied by the district director on October 30, 1986, because the evidence failed to establish the existence of pneumoconiosis. Director's Exhibit 1. The miner's second claim, filed on February 12, 1997, was finally denied by the district director on May 15, 1997, because the evidence failed to establish any elements of entitlement. Director's Exhibit 2. The miner took no further action on either of these prior claims.

³ The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibits 1, 2, 3, 5. 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, 1-202 (1989)(*en banc*).

⁴ Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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).

86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 17. Considering the merits of the claim, the administrative law judge found that the evidence of record did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of the miner's totally disabling respiratory impairment at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter brief agreeing with claimant that this case should be remanded for further consideration.⁵

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. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant asserts that in evaluating the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Caparros, Mullins, Fuhrman, Batcha, and Cohen, who diagnosed coal workers' pneumoconiosis and/or chronic obstructive lung disease (COPD), chronic bronchitis, or emphysema due to coal

⁵ The administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414, his findings that the evidence establishes at least a thirteen and one-half year coal mine employment history and a sixty-six pack-year smoking history, and his findings at 20 C.F.R. §§725.309(d) and 718.202(a)(1)-(3), are affirmed as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

dust exposure, than to the contrary opinions of Drs. Zaldivar and Castle, who diagnosed bullous emphysema unrelated to coal dust exposure.

Initially, claimant contends that in finding the evidence insufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in according little weight to the opinions of Drs. Mullins and Cohen, the only physicians to diagnose the disease. We disagree.

Claimant specifically contends that in discrediting the opinion of Dr. Mullins, the administrative law judge failed to consider that, in addition to a chest x-ray, Dr. Mullins' diagnosis of clinical pneumoconiosis was based on pulmonary function tests, blood gas studies, work history, and smoking history. Claimant's Brief at 4. In evaluating Dr. Mullins' opinion, the administrative law judge properly noted that Dr. Mullins had examined the miner on November 11, 2004, and had reviewed the miner's smoking and employment histories and performed objective testing. Decision and Order at 11-12; Director's Exhibit 15. The administrative law judge further noted that, "[b]ased on" pulmonary function and blood gas studies and a positive chest x-ray, Dr. Mullins diagnosed, among other things, "[chest x-ray] consistent with coal mine employment." Decision and Order at 11-12; Director's Exhibit 15. Thus, contrary to claimant's argument, the administrative law judge fully considered that Dr. Mullins' opinion was based on more than a chest x-ray, and acted within his discretion in concluding that Dr. Mullins' diagnosis was " cursory" and "not sufficiently reasoned" to support a finding of clinical pneumoconiosis. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 21; Claimant's Brief at 4.

In considering the opinion of Dr. Cohen, the administrative law judge concluded that because Dr. Cohen had considered only claimant's coal dust and tobacco smoke exposures, and had not discussed claimant's diagnosed asbestosis, his diagnosis of clinical pneumoconiosis was "questionable." Decision and Order at 14, 21; Claimant's Exhibit 4. Claimant contends that the record does not contain a diagnosis of asbestosis, and that, therefore, it was irrational for the administrative law judge to discredit Dr. Cohen's opinion on this basis. Claimant's Brief at 4-5. Contrary to claimant's argument, however, the record reflects that Dr. Sheridan, a treating physician, diagnosed the miner with asbestosis on at least six separate occasions between August 27, 1996 and June 17, 1997; that Franklin Square Hospital physicians diagnosed asbestosis on July 20, 1997; and that the record contains numerous other references to the miner's history of asbestos exposure in his non-coal mine employment. Director's Exhibits 2, 3. Therefore, the administrative law judge permissibly discredited Dr. Cohen's opinion because he had not considered this occupational exposure. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). As the administrative law judge permissibly discredited the only physicians' opinions diagnosing clinical pneumoconiosis, we need not address claimant's additional

arguments that the administrative law judge erred in considering the diagnoses contained on the miner's death certificate, which claimant contends is not contained in the record, and failed to explain his reference to Dr. Zaldivar's opinion.⁶ Claimant's Brief at 4. Any error by the administrative law judge in discussing this evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant next contends that the administrative law judge's finding that the evidence is insufficient to establish the existence of legal pneumoconiosis 20 C.F.R. §718.202(a)(4), in the form of either COPD or emphysema due to coal dust exposure, is not supported by substantial evidence. Claimant's Brief at 5. We disagree. In his analysis of the evidence relevant to the existence of legal pneumoconiosis, the administrative law judge properly noted that Drs. Mullins, Cohen, and Caparros opined that the miner's obstructive lung disease, or COPD, was related to both smoking and coal dust exposure. Decision and Order at 11-15, 22. By contrast, the administrative law judge determined that Drs. Zaldivar and Castle, noting the reversibility of the obstruction, opined that the miner's lung impairment was due solely to smoking, and that the remainder of the physicians did not provide an opinion as to the etiology of the miner's lung condition. Decision and Order at 11-15, 22. The administrative law judge further noted that Drs. Zaldivar, Castle, and Fuhrman additionally diagnosed emphysema, which they attributed predominantly to smoking, while Dr. Batcha diagnosed emphysema due to coal dust exposure, and Dr. Loh diagnosed emphysema but did not discuss the etiology of the disease. Decision and Order at 11-15, 22.

Initially, we hold that there is no merit to claimant's contention that in discussing the diagnoses of COPD and emphysema separately, the administrative law judge "failed to appreciate" that emphysema and chronic bronchitis are chronic obstructive pulmonary diseases. Claimant's Brief at 5. The administrative law judge specifically took note that COPD is defined as the "combination of emphysema and chronic obstructive bronchitis." Decision and Order at 26 n.38. We also reject claimant's arguments that the administrative law judge erred in failing to discuss the opinions of Drs. Rasmussen and Sheridan, and further erred in stating that twelve physicians offered opinions relevant to the existence of legal pneumoconiosis. Claimant's Brief at 5. Contrary to claimant's assertion, the administrative law judge considered the opinions of both Dr. Rasmussen and Dr. Sheridan. Decision and Order at 14; Director's Exhibits 1, 2. However, as neither physician offered an opinion as to the etiology of the lung diseases and

⁶ In weighing together all of the evidence relevant to the existence of pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000), the administrative law judge stated: "Given the X-ray evidence, the Death Certificate and the opinion of Dr. Zaldivar, I find clinical [coal workers' pneumoconiosis] not established." Decision and Order at 21.

impairments they diagnosed, the administrative law judge was not required to specifically discuss their opinions when weighing the relevant medical opinion evidence together at 20 C.F.R. §718.202(a)(4). Decision and Order at 14, 22; Director's Exhibits 1, 2. In addition, as the administrative law judge properly considered all of the relevant medical opinions of record, any error by the administrative law judge in quantifying the exact number of physicians associated with this claim is harmless. *See Larioni*, 6 BLR at 1-1278.

We also reject claimant's arguments that the administrative law judge misinterpreted Dr. Fuhrman's opinion as not supportive of a finding of legal pneumoconiosis, and failed to consider Dr. Batcha's examination report dated February 28, 1997. Claimant's Brief at 6; Director's Exhibits 1, 2. First, the administrative law judge properly noted Dr. Fuhrman's statements in his July 17, 1986 narrative report that the miner suffered from pulmonary changes compatible with chronic bronchitis and emphysema, and that while the miner had a history of underground coal mine work, Dr. Fuhrman believed that "the bulk of [the miner's] problems come from smoking" Director's Exhibit 1. The administrative law judge permissibly concluded, based on Dr. Fuhrman's wording, however, that Dr. Fuhrman had attributed the miner's obstructive lung impairment "predominantly" to smoking. Decision and Order at 22. Therefore, the administrative law judge acted with his discretion in finding Dr. Fuhrman's opinion insufficient to support a finding of legal pneumoconiosis. 20 C.F.R. §§718.201(b); 718.202(a)(4); Decision and Order at 22. Second, contrary to claimant's argument, a review of the administrative law judge's decision reveals that he fully considered Dr. Batcha's examination report dated February 28, 1997, and properly noted that Dr. Batcha had diagnosed emphysema, chronic bronchitis, and bronchospasm due to both smoking and coal dust exposure. Decision and Order at 21-22; Director's Exhibit 2. The administrative law judge concluded, however, that the preponderance of the evidence, represented by the opinions of Drs. Zaldivar and Castle, established that the miner's emphysema was due to smoking. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994); 5 U.S.C. §556(d); 20 C.F.R. §725.103; Decision and Order at 22.

Claimant next asserts that the administrative law judge erred when he "automatically discount[ed]" the opinions of Drs. Caparros and Mullins, who diagnosed COPD due to both smoking and coal dust exposure, because their qualifications are not contained in the record. Claimant also contends that the administrative law judge made only one comment about Dr. Cohen's opinion, and that comment was inaccurate. Claimant's Brief at 6-7. We disagree.

In considering the physicians' opinions relevant to the cause of the miner's COPD, the administrative law judge properly noted that Drs. Mullins, Cohen, and Caparros opined that the miner's obstructive lung disease was related to both smoking and coal

dust exposure, while Drs. Zaldivar and Castle opined that the miner's lung impairment was due solely to smoking. Decision and Order at 11-15, 21-22; Claimant's Exhibit 4; Director's Exhibits 3, 15, 27; Employer's Exhibits 1, 6, 7. The administrative law judge acted within his discretion in according the opinions of Drs. Caparros and Mullins less weight because, in addition to their qualifications being unknown, Dr. Caparros' opinion was both the oldest and was "equivocal regarding causation," and Dr. Mullins' opinion was cursory and unreasoned, as discussed above. *See Webber v. Peabody Coal Co.*, 23 BLR 1- 123 (2006)(*en banc*)(Boggs, J., concurring); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004)(*en banc*)(McGranery, J., concurring and dissenting); *Clark*, 12 BLR at 1-155; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 21, 22; Director's Exhibits 3, 15. Thus, there is no merit to claimant's contention that the administrative law judge automatically discounted the opinions of Drs. Mullins and Caparros simply because their qualifications are not contained in the record. Rather, the administrative law judge properly considered the physicians' qualifications as part of his overall analysis of the medical opinion evidence. There is also no merit to claimant's assertion that the administrative law judge made only "one comment" regarding Dr. Cohen's opinion. The administrative law judge discussed Dr. Cohen's opinion throughout his decision, summarizing the physician's findings and noting his credentials. Decision and Order at 13-14, 21-22. In addition, contrary to claimant's arguments, as Dr. Cohen specifically diagnosed "a fixed and permanent obstructive defect that is severe," we hold that the administrative law judge's summary of Dr. Cohen's opinion, as reflecting a fixed irreversible obstruction, is accurate. Claimant's Exhibit 4; Decision and Order at 22.

Finally, claimant asserts that in his analysis of the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in finding that the opinions of Drs. Zaldivar and Castle, that the miner does not have legal pneumoconiosis, outweigh the contrary the opinion of Dr. Cohen. Claimant's Brief at 7-10. We disagree.

Initially, regarding the administrative law judge's consideration of the relative qualifications of the physicians pursuant to 20 C.F.R. §718.202(a)(4), we reject claimant's argument that Dr. Cohen's "sterling credentials in experience, published research and consulting service in occupational lung disease" mandate that his opinion be given the greatest weight. Claimant's Brief at 9-10. The administrative law judge permissibly found the opinions of Drs. Cohen, Zaldivar, and Castle to be the most probative of record, because they are all B readers, they are all Board-certified in both internal medicine and pulmonary disease, and because they had each conducted a thorough record review and had each prepared a detailed, comprehensive, and more recent report. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Parsons*, 23 BLR at 1-35; *Clark*, 12 BLR at 1-155; *Justice*, 11 BLR at 1-94; Decision and Order at 12-13, 21; Claimant's Exhibit 4; Director's Exhibit 27; Employer's Exhibits 1, 6, 7. In addition, contrary to claimant's argument, the administrative law judge also

considered Dr. Cohen's additional Board-certification in critical care medicine, but permissibly concluded that the physicians' qualifications are "essentially equal." See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 522, 21 BLR 2-323, 2-325 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-67 (2004)(*en banc*); Decision and Order at 13, 21.

We further find no merit in claimant's contention that the opinions of Drs. Zaldivar and Castle are in conflict with the Act, and that therefore, the administrative law judge erred in relying upon them to support the denial of benefits. First, contrary to claimant's argument, Dr. Castle's statement that the significant degree of reversibility demonstrated on the miner's pulmonary function studies was "not what one would expect" with coal workers' pneumoconiosis, does not qualify as an opinion antithetical to the Act. See *Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, 21 BLR 2-34, 2-46 (4th Cir. 1997); Claimant's Brief at 9; Employer's Exhibit 7 at 18-19. Similarly, we reject the argument set forth by both claimant and the Director that Dr. Zaldivar premised his opinion on the erroneous assumption that in the absence of x-ray evidence of clinical pneumoconiosis, coal dust exposure cannot cause an obstructive impairment. 30 U.S.C. §923(b); 20 C.F.R. §718.202(b); Claimant's Brief at 8; Director's Brief at 1. Dr. Zaldivar explained that while x-rays are helpful in defining the cause of a breathing problem, they are just one tool in the diagnostic arsenal. Employer's Exhibit 6 at 38-9. In addition, Dr. Zaldivar explicitly stated that he agreed with the position that coal mine dust can cause obstructive lung disease, even in the absence of clinical pneumoconiosis. Employer's Exhibit 6 at 121. Finally, we disagree with the Director's assertion that Dr. Zaldivar "believes that when coal mine work causes emphysema, the disease appears only if the miner has complicated pneumoconiosis . . . or has the 'focal' type of emphysema." Director's Brief at 1. Contrary to the Director's contention, Dr. Zaldivar stated only that simple coal workers' pneumoconiosis does not cause *bullous* emphysema, and explicitly stated that he does *not* agree that coal dust exposure causes only focal emphysema. Employer's Exhibit 6 at 42, 49. Thus, as the record reflects that Dr. Castle and Dr. Zaldivar based their opinions on a thorough review of all the medical evidence, including the miner's pulmonary function studies, blood gas studies, x-ray readings, and history of tobacco, asbestos, and coal dust exposure, rather than on assumptions that contravene the Act and regulations, we hold that the administrative law judge permissibly relied on their opinions to support a denial of benefits. See *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).

Thus, contrary to claimant's argument, the administrative law judge permissibly concluded that while Drs. Zaldivar, Castle, and Cohen possessed "essentially equal" qualifications, and each prepared a detailed and comprehensive report in support of his conclusions, the opinions of Drs. Castle and Zaldivar outweighed the contrary opinion of Dr. Cohen, and that, therefore, claimant failed to establish the existence of

pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a)(4). *See Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; Decision and Order at 22. The evaluation of the physicians' opinions is within the province of the administrative law judge. *Compton*, 211 F.3d at 211, 22 BLR at 2-175. As the administrative law judge properly considered all of the relevant medical evidence, and as his analysis of that evidence is supported by substantial evidence in the record, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). *Mays*, 176 F.3d at 762 n. 10, 21 BLR at 2-603 n. 10.

Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address claimant's challenge to the administrative law judge's finding that the evidence fails to establish that the miner's totally disabling respiratory impairment was due to pneumoconiosis at 20 C.F.R. §718.204(c). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge