BRB No. 08-0662 BLA

D.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAYNE ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 05/28/2009
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein and Lee Ann Rhodes (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (06-BLA-5857) of Administrative Law Judge Thomas M. Burke rendered 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). In a Decision and Order dated June 5, 2008, the administrative law judge credited claimant with 24.01 years of coal mine employment[1] and found that claimant established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to coal dust exposure, pursuant to 20 C.F.R. §718.202(a)(4).[2] The administrative law judge further found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and, by extension, erred in finding that claimant's totally disabling respiratory impairment is due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[3]

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,

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[1] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] 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).

[3] The administrative law judge's finding of 24.01 years of coal mine employment, and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), 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).

718.204. Failure to establish any one of these elements precludes 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).

Employer initially contends that, in finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in according less weight to the opinions of Drs. Fino and Kaplan, than to the opinions of Drs. Begley and Saludes. Employer's Brief at 4. We disagree.

In evaluating the medical opinion evidence relevant to the existence of pneumoconiosis, the administrative law judge properly found that Drs. Begley and Saludes diagnosed claimant with obstructive lung disease due in part to coal dust exposure. Decision and Order at 8-9; Director's Exhibit 11; Claimant's Exhibits 2-4. Drs. Fino and Kaplan opined that claimant does not suffer from any lung disease significantly related to coal dust exposure, but instead suffers from asthma, unrelated to coal dust exposure.[4] Decision and Order at 9; Employer's Exhibits 1, 2, 4, 5. The administrative law judge accorded significant weight to the opinions of Drs. Begley and Saludes, as well-reasoned and well-documented, and supported by the objective medical evidence. Decision and Order at 9. By contrast, the administrative law judge accorded less weight to the opinions of Drs. Fino and Kaplan as unsupported by the medical evidence of record and inadequately explained. Decision and Order at 9-10. The administrative law judge concluded, therefore, that the weight of the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 10.

[4] Dr. Begley, who is Board-certified in Internal Medicine, Pulmonary Medicine, and Critical Care Medicine, diagnosed both simple coal workers' pneumoconiosis and obstructive lung disease due to coal dust exposure and to cigarette smoking. Claimant's Exhibit 3 at 14-15, 21. Dr. Saludes, who is Board-certified in Pulmonary Medicine and General Medicine, diagnosed chronic obstructive pulmonary disease (COPD) primarily due to coal dust exposure. Claimant's Exhibit 4 at 13, 14-16. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Medicine, diagnosed COPD due to asthma, unrelated to coal dust exposure. Employer's Exhibits 1, 4 at 26. Dr. Kaplan, who is Board-certified in Internal Medicine, Pulmonary Medicine, and Critical Care Medicine, diagnosed COPD due to asthma, unrelated to coal dust exposure, and to cigarette smoking. Employer's Exhibits 2, 5 at 11. In addition, the administrative law judge considered the opinion of Dr. Zlupko, who diagnosed a moderate to severe obstructive ventilatory impairment, but stated that the cause of the impairment was "unknown." Director's Exhibit 12.

Initially, we reject employer's argument that the administrative law judge erred in discrediting the opinion of Dr. Fino. Employer's Brief at 5-8. Dr. Fino examined claimant and submitted a written report dated January 11, 2006, and testified by deposition on August 20, 2007. Employer's Exhibits 1, 4. Dr. Fino diagnosed "significant airway obstruction" due to asthma, based on claimant's wheezing, the results of lung function studies that revealed "significant reversibility" following the administration of bronchodilators, and the lack of abnormality in claimant's diffusion capacity. Employer's Exhibit 1. Dr. Fino acknowledged that there was a fixed obstructive abnormality present, which would be consistent with coal dust exposure, but stated that in this case, he did not believe that coal dust exposure played a significant role in claimant's obstructive lung disease. Rather, Dr. Fino opined that the fixed impairment was due to airways remodeling, as a result of claimant's having had asthma for approximately nine years. Employer's Exhibits 1, 4 at 15-16, 25.

The administrative law judge properly noted that, in his written report, Dr. Fino explained his conclusion, in part, by referencing data showing that "the average loss of FEV1 for someone who has worked 25 years underground in the mines would be in the neighborhood of 200 to 300 cc." Decision and Order at 6, 10; Employer's Exhibit 1. Dr. Fino stated that because claimant's "loss of FEV1 is much greater than [200 to 300 cc]" it would therefore "need to be explained by something other than coal mine dust inhalation," and he concluded that claimant "has classic findings of an asthma condition." Decision and Order at 10; Employer's Exhibit 1.

In discounting Dr. Fino's opinion, that the fixed component of claimant's obstructive lung disease was the result of airways remodeling due to longstanding asthma, the administrative law judge initially noted, correctly, that Dr. Fino failed to explain the absence of a history of asthma diagnoses in claimant's medical record.[5] *See*

[5] The administrative law judge noted that, by contrast, Drs. Begley and Saludes explained fully why the medical record supports their conclusions that claimant does not have asthma. Decision and Order at 8-10. Dr. Begley opined that claimant does not have asthma, and supported his conclusion, in part, by explaining that patients who have asthma that is severe enough to result in airways remodeling would have a documented history of recurrent episodic attacks. Decision and Order at 8-10; Claimant's Exhibit 3 at 32-33. Dr. Begley indicated that claimant's medical records did not include a history of recurrent episodic asthma. Decision and Order at 8-10; Claimant's Exhibit 3 at 33. Similarly, Dr. Saludes opined that claimant does not have asthma, and stated that, if he did, it would be "unusual" for someone with claimant's degree of airflow obstruction not to have been seen and treated for asthma. Decision and Order at 8-10; Claimant's Exhibit 4 at 13-14. Dr. Saludes agreed that the medical record did not reflect that claimant had ever been diagnosed previously with asthma. Decision and Order at 8-10; Claimant's Exhibit 4 at 14.

Balsavage v. Director, OWCP, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 9-10. The administrative law judge also noted that, in contrast to his written report, when deposed, Dr. Fino testified that he excluded coal dust as a significant contributing cause of claimant's obstruction based in part on studies showing that the "average loss of FEV1 post dust regulations would be about 3 cc's of FEV1 per year which is 75 cc's." Decision and Order at 10; Employer's Exhibit 4 at 15. The administrative law judge permissibly found that Dr. Fino's presentation of "two drastically different numbers for the average loss of FEV1" that claimant could have been expected to sustain as a result of working in the mines "call[ed] into question the accuracy of his opinion and his analysis," and further found that Dr. Fino had not documented either of these numbers by reference to the medical literature. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order at 10. Thus, contrary to employer's assertion, based on the above factors, the administrative law judge acted within his discretion in concluding that Dr. Fino had not adequately explained how he could exclude coal dust as a significant contributing factor to the irreversible component of claimant's COPD. *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *see also Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. May 11, 2004); Decision and Order at 10.

Further, we reject employer's argument that the administrative law judge erred in discounting Dr. Kaplan's opinion as unreasoned. Employer's Brief at 8-9. Dr. Kaplan examined claimant and submitted a written report dated July 16, 2007, and testified by deposition on October 29, 2007. Employer's Exhibits 2, 5. The administrative law judge properly found that, like Dr. Fino, Dr. Kaplan opined that claimant's COPD was not due to coal dust exposure, but was due to longstanding asthma and to claimant's smoking history. Decision and Order at 5-6; Employer's Exhibits 2, 5. In his written report, Dr. Kaplan stated that he based his conclusion as to the etiology of claimant's COPD on the lack of positive x-ray evidence for coal workers' pneumoconiosis, claimant's normal lung volumes and diffusing capacity, and claimant's history of wheezing. Employer's Exhibit 2. In his deposition, Dr. Kaplan testified that claimant's pulmonary function studies demonstrated "some reversibility" after the administration of bronchodilators, and "some fixed airflow obstruction." Employer's Exhibit 5 at 12, 14. Dr. Kaplan added that, while a lack of reversibility is consistent with impaired lung function due to pneumoconiosis, it is also consistent with asthma that has progressed to the point where the airways have been remodeled. Employer's Exhibit 5 at 14-15. When asked to explain his opinion that claimant's obstructive impairment was not significantly related to, or substantially aggravated by, coal dust exposure, Dr. Kaplan stated that patients with complicated

pneumoconiosis or advanced simple pneumoconiosis have "significant impairment of lung function without reversibility." Employer's Exhibit 5 at 28. Dr. Kaplan stated that, by contrast, claimant has "reversible, partially reversible airflow obstruction. That does not happen in coal workers' pneumoconiosis." Employer's Exhibit 5 at 28.

The administrative law judge discounted Dr. Kaplan's opinion, in part, because Dr. Kaplan failed to explain how he was able to exclude coal dust as a contributing factor to claimant's obstructive impairment. Decision and Order at 10. A review of Dr. Kaplan's deposition testimony, summarized above, supports this determination. Dr. Kaplan diagnosed claimant with both a reversible and a fixed obstructive impairment, and he opined that coal dust exposure causes a fixed impairment. Employer's Exhibit 5 at 12, 14. As the administrative law judge found, however, while Dr. Kaplan explained why both the reversible and fixed portions of claimant's obstructive impairment could be due to asthma, Dr. Kaplan did not explain, as opined by Dr. Saludes, why the mere fact that claimant may have asthma, or an underlying asthmatic component, means that claimant does not also have an impairment related to coal dust. Decision and Order at 10. Thus, contrary to employer's assertion, the administrative law judge permissibly discredited the opinion of Dr. Kaplan, in part, because the physician failed to explain how he could exclude coal dust as a significant contributing factor to the irreversible component of claimant's COPD. *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *see also Swiger*, 98 F. App'x. at 237; Decision and Order at 10.

The administrative law judge provided valid reasons for his determination to discredit the opinions of Drs. Fino and Kaplan, the only physicians of record to opine that claimant does not suffer from legal pneumoconiosis.[6] *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Moreover, employer raises no challenge to the administrative law judge's finding that the opinions of Drs. Begley and Saludes, that claimant's COPD is due to coal dust exposure, are well-reasoned and entitled to significant weight. *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). Therefore, we affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). We also affirm the administrative law judge's conclusion that, weighing all of the evidence together, the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a). *See*

[6] As the administrative law judge permissibly discredited the opinions of Drs. Fino and Kaplan as unreasoned, we need not address employer's additional allegations of error with respect to the administrative law judge's weighing of their opinions pursuant to 20 C.FR. §718.202(a)(4). *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Penn Allegheny Coal Co. v. Williams, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Decision and Order at 10.

Turning to the issue of the cause of claimant's disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c), the administrative law judge correctly stated that a miner is totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); Decision and Order at 10. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003).

In evaluating the evidence relevant to the issue of disability causation at 20 C.F.R. §718.204(c), the administrative law judge credited the opinions of Drs. Begley and Saludes, that coal dust exposure is the "significant" or "primary" cause of claimant's disabling respiratory impairment. The administrative law judge found that their opinions were sufficient to establish that claimant's legal pneumoconiosis substantially contributes to his disability. On appeal, employer raises no challenge to the administrative law judge's determination to credit their opinions. *See Gross*, 23 BLR at 1-17; *Skrack*, 6 BLR at 1-711; Decision and Order at 11. Moreover, the administrative law judge acted within his discretion in according less weight to the contrary opinions of Drs. Fino and Kaplan, as their conclusion that claimant does not suffer from legal pneumoconiosis was contrary to the administrative law judge's own findings. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Clark*, 12 BLR at 1-155; Decision and Order at 10. We therefore affirm the administrative law judge's finding, pursuant to 20 C.F.R. §718.204(c), that pneumoconiosis is a substantially contributing cause of claimant's disabling respiratory impairment.

Although employer disagrees with the administrative law judge's credibility findings in this case, employer's arguments amount to a request that the Board reweigh the evidence, which we are not authorized to do. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge's findings. We therefore affirm the award of benefits.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge