BRB No. 09-0502 BLA

DIXIE SLOAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 05/12/2010
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

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

Richard A. Seid and Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (07-BLA-5131) of Administrative Law Judge Alice M. Craft rendered on a claim filed 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). The administrative law judge credited claimant with nineteen years of coal mine employment,[1] based on the parties' stipulation, and found that claimant established the existence of clinical pneumoconiosis, based on the x-ray and computerized tomography (CT) scan evidence, pursuant to 20 C.F.R. §§718.202(a)(1), 718.107. The administrative law judge further found that the medical opinion evidence established legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine employment, pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b)(2), 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in excluding a negative reading of the October 3, 2005 chest x-ray that was submitted by employer. On the merits, employer challenges the administrative law judge's findings of clinical and legal pneumoconiosis. With respect to legal pneumoconiosis, employer asserts that the administrative law judge erred in considering the preamble to the revised regulations when she weighed the medical opinion evidence. Employer further challenges the administrative law judge's finding of total disability due to 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 (the Director), has filed a limited response, urging the Board to reject employer's assertion that the administrative law judge erred in considering the preamble to the revised regulations when she assessed the reasoning of the medical opinions at 20 C.F.R. §718.202(a)(4). Employer has filed reply briefs, reiterating its contentions.[2]

By order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The Director and employer have responded.

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[1] The record indicates that claimant's last coal mine employment was in Indiana. Director's Exhibit 3. Accordingly, the law of the United States Court of Appeals for the Seventh Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established that she suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. Specifically, the Director notes that, although Section 1556 reinstated a rebuttable presumption of total disability due to pneumoconiosis that is potentially applicable to claims such as this one,[3] the administrative law judge awarded benefits pursuant to the pre-amendment version of the Act, which required claimant to establish all elements of the claim by a preponderance of the evidence. Therefore, the Director concludes, if the Board affirms the administrative law judge's award of benefits, the reinstated presumption "need not be considered." Director's Supplemental Brief at 2.

Employer responds with a Motion to Remand this case to the district director. Employer "requests remand so that it may respond to the changes in law with proof. Due process considerations require no less." Motion for Remand at 1 (citations omitted).

Based upon the parties' responses, and our review, we hold that the disposition of this case is not affected by Section 1556. As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried her burden to establish each element of entitlement by a preponderance of the evidence, we agree with the Director that there is no need to consider whether claimant could establish entitlement with the aid of the rebuttable presumption reinstated by Section 1556. Thus, we reject employer's argument that due process requires a remand to the district director for the parties to submit new evidence. Accordingly, we deny employer's Motion to Remand, and we will proceed with the adjudication of this 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. 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).

[3] Relevant to this living miner's claim, Section 1556 reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Supplemental Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). As the Director notes, claimant filed her claim after January 1, 2005, and has established nineteen years of coal mine employment.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

20 C.F.R. §725.414(a)(3)(ii): Employer's Opportunity to Submit Rebuttal Evidence

Employer initially asserts that the administrative law judge erred in failing to admit Dr. Shipley's interpretation of the October 3, 2005 x-ray as rebuttal evidence under 20 C.F.R. §725.414(a)(3)(ii). Employer's Brief at 17. We disagree.

Pursuant to 20 C.F.R. §725.414(a), both claimant and employer are entitled to submit, in rebuttal of the case presented by the opposing party, one interpretation of each x-ray submitted by the opposing party in support of its affirmative case, or by the Director as part of the Department of Labor (DOL) complete pulmonary evaluation. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). In this case, as part of the DOL pulmonary evaluation, Dr. Whitehead interpreted the October 3, 2005 x-ray as positive for pneumoconiosis. Director's Exhibit 9. Claimant designated Dr. Ahmed's positive interpretation of the October 3, 2005 x-ray as her rebuttal interpretation, and employer designated Dr. Wiot's negative interpretation of the October 3, 2005 x-ray as its rebuttal interpretation. Director's Exhibits 18, 24; Claimant's Evidence Summary; Employer's Evidence Summary. Claimant did not designate any affirmative interpretations of the October 3, 2005 x-ray. Thus, employer was entitled to submit one rebuttal interpretation of the DOL chest x-ray interpretation. *See* 20 C.F.R. §725.414(a)(3)(ii); *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-82-83 (2008). Consequently, the administrative law judge did not err in excluding employer's second rebuttal x-ray interpretation, absent a showing of good cause by employer for exceeding the evidentiary limitations.[4]

20 C.F.R. §718.202(a)(4): The Existence of Pneumoconiosis

[4] The record reflects that employer submitted its full complement of two affirmative x-ray interpretations, specifically, Dr. Spitz's interpretation of the February 23, 2006 x-ray, and Dr. Wiot's interpretation of the May 9, 2006 x-ray. *See* 20 C.F.R. §725.414(a)(3)(i); Director's Exhibit 23; Employer's Exhibit 5; Employer's Evidence Summary.

Relevant to the existence of legal pneumoconiosis[5] at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Chavez,[6] Harris,[7] Cohen,[8] Repsher,[9] and Renn.[10] Finding that Dr. Chavez based his opinion on his extensive familiarity with claimant's condition, and that Dr. Harris's opinion was consistent with the regulations and supported by the evidence on which it was based, the administrative law judge found that the opinions of Drs. Chavez and Harris were entitled to some weight. Further, the administrative law judge found that Dr. Cohen considered all of the known risk factors for lung disease applicable to claimant, that the doctor supported his opinion with clinical findings and objective testing, and that he explained his opinion in the context of the prevailing medical view that coal dust can cause obstructive disease and clinically significant impairment. The administrative law judge,

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[5] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] Dr. Chavez diagnosed chronic obstructive pulmonary disease (COPD) and pneumoconiosis, and opined that, "[i]t is my best estimate that probably both diseases account for the patient's symptoms." Claimant's Exhibit 2.

[7] Dr. Harris diagnosed COPD and chronic bronchitis, and stated that claimant's pulmonary disease is due to smoking and coal dust exposure. Director's Exhibit 9 at 6.

[8] Dr. Cohen diagnosed a severe obstructive defect, a severe diffusion impairment, and significant gas exchange abnormalities with exercise. Dr. Cohen attributed claimant's chronic obstructive lung disease to smoking and coal mine dust exposure. Claimant's Exhibit 6 at 9, 13.

[9] Dr. Repsher stated that there was no evidence of clinical or legal pneumoconiosis. Dr. Repsher opined that claimant's pulmonary function studies showed "pure obstructive disease, which is characteristic of cigarette smoking induced COPD and quite atypical for coal mine dust induced COPD." Director's Exhibit 23 at 5. He further stated that claimant's blood gas studies show "moderate to severe hypoxemia with at least transient CO2 retention," which is "characteristic of cigarette smoking induced COPD and quite unusual for coal mine dust induced COPD." *Id*. at 6.

[10] Dr. Renn opined that there was no evidence of legal pneumoconiosis. He diagnosed bullous emphysema and hypercarbia due to smoking, and additionally opined that claimant's diffusing capacity impairment was due to her Crohn's disease and smoking-induced emphysema. Employer's Exhibit 1 at 6.

therefore, determined that Dr. Cohen's opinion was entitled to "great weight." Decision and Order at 32.

By contrast, the administrative law judge found that, "[a]lthough [Dr. Repsher] gave passing reference to the concept of legal pneumoconiosis, he focused almost exclusively on the characteristics of clinical pneumoconiosis," and that his conclusions, regarding the nature of obstructive disease and the extent of impairment caused by coal dust exposure, were "contrary to the prevailing medical views described in the commentary accompanying the current regulations." Decision and Order at 33. The administrative law judge, therefore, found that Dr. Repsher's opinion was entitled to little weight. With respect to Dr. Renn's opinion, the administrative law judge found that Dr. Renn focused on the effects of clinical pneumoconiosis, and failed to adequately explain his opinion that the improvement seen between claimant's October 2005 and May 2006 pulmonary function studies was inconsistent with a coal-dust related impairment, given that the May 2006 study still demonstrated a severe obstructive impairment. The administrative law judge therefore found Dr. Renn's opinion entitled to "less weight." *Id*. Weighing all of the medical opinion evidence together, the administrative law judge concluded that the opinions of Drs. Chavez, Harris, and Cohen were entitled to greater weight than the opinions of Drs. Repsher and Renn, and that claimant, therefore, established legal pneumoconiosis by the medical opinion evidence. *Id*. at 34.

Employer asserts that the administrative law judge erred in crediting Dr. Cohen's opinion and in discrediting the opinions of Drs. Repsher and Renn. Specifically, employer asserts that Dr. Cohen's opinion is unreasoned and insufficient to establish legal pneumoconiosis because Dr. Cohen did not "rule in" coal dust exposure as a cause of claimant's obstructive impairment. Employer's Brief at 27. We disagree.

Contrary to employer's assertion, the administrative law judge accurately observed that, in affirmatively attributing claimant's chronic obstructive lung disease to both smoking and coal mine dust exposure, Dr. Cohen diagnosed legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 25; Claimant's Exhibit 6 at 13. Further, substantial evidence supports the administrative law judge's finding that Dr. Cohen based his opinion on clinical findings and objective evidence; he explained his opinion in the context of the prevailing medical view that coal dust can cause clinically significant obstructive impairment; and he considered all of the known risk factors for lung disease applicable to claimant, including smoking, coal dust exposure, and Crohn's disease. The administrative law judge, therefore, permissibly found that Dr. Cohen's opinion was well-reasoned and entitled to great weight. *See Livermore v. Amax Coal Co.*, 297 F.3d 668, 672, 22 BLR 2-399, 2-408 (7th Cir. 2002); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992).

We additionally reject employer's assertion that the administrative law judge erred in relying on the preamble to the regulations as "facts" or "evidence" that enhanced or diminished the credibility of the medical opinion evidence at 20 C.F.R. §718.202(a)(4).[11] Contrary to employer's assertions, the administrative law judge neither treated the preamble as evidence nor did she take judicial notice of it. Rather, the administrative law judge consulted the preamble as an authoritative statement of medical principles accepted by DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. Further, as the Director points out, both the United States Court of Appeals for the Seventh Circuit and the Board have approved of an administrative law judge's use of the preamble in this manner. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009). In *Beeler*, the Seventh Circuit held that the administrative law judge sensibly discounted Dr. Tuteur's opinion, that Beeler's condition had to be caused by smoking because miners rarely have clinically significant obstruction from coal dust, in light of DOL's finding of a consensus among scientists and researchers that coal dust-induced COPD is clinically significant. 521 F.3d at 726, 24 BLR at 2-103. Similarly, in *Obush*, the Board held that a determination of whether a medical opinion is supported by accepted scientific evidence, as determined by DOL in the preamble to the revised regulations, is a valid criterion in deciding whether to credit the opinion. 24 BLR at 1-125-26.

Thus, in the case at bar, the administrative law judge permissibly discounted Dr. Repsher's opinion, that coal mine dust exposure does not cause clinically significant obstructive impairment, because it is inconsistent with the medical literature credited by DOL. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-35, 2-37, (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001). We reject employer's assertion that the administrative law judge mischaracterized Dr. Repsher's opinion in this respect. Although employer argues that Dr. Repsher's opinion could be interpreted as stating that "coal dust induced decrements [in lung function] occur only

[11] In her Decision and Order, the administrative law judge cited portions of the preamble that discussed the prevailing medical literature recognizing coal mine dust exposure as a potential cause of COPD; acknowledging the additive risk of developing lung disease if the miner also smokes; linking disabling COPD associated with coal dust exposure to decrements in lung function measurements; and acknowledging the similarity between the manner in which dust exposure and smoking cause emphysema. Further, the administrative law judge cited preamble language requiring proof of the relationship between coal dust exposure and a miner's COPD on a claim-by-claim basis, and imposing the burden of proof on the miner. Decision and Order at 31, *citing* 65 Fed. Reg. 79938-43 (Dec. 20, 2000).

rarely," the record reflects that Dr. Repsher specifically stated that coal dust exposure does not cause clinically significant COPD. *See Beasley*, 957 F.2d at 327, 16 BLR at 2-48; Employer's Exhibit 10 at 26; Employer's Brief at 28.

We also reject employer's assertion that the administrative law judge failed to state a valid reason for discounting Dr. Renn's opinion. The administrative law judge acted within her discretion as the fact-finder when she determined that Dr. Renn did not adequately explain why the improvement seen on claimant's pulmonary function studies necessarily eliminated coal dust exposure as a cause of claimant's obstructive lung disease, given that the studies still showed a severe obstructive impairment. *See Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002).

Because the administrative law judge provided valid reasons for crediting Dr. Cohen's opinion and for discounting the opinions of Drs. Repsher and Renn, we reject employer's assertion that, "there is no substantial evidence of legal pneumoconiosis." *See Beasley*, 957 F.2d at 327, 16 BLR at 2-48. Because employer raises no further challenges to the administrative law judge's weighing of the medical opinion evidence, we affirm her finding that claimant established legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).[12] *See Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318.

20 C.F.R. §718.204(c): Disability Causation

Employer asserts that the administrative law judge erred in finding total disability due to pneumoconiosis established at 20 C.F.R. §718.204(c), because she erred in finding legal pneumoconiosis established under 20 C.F.R. §718.202(a)(4). We disagree.

[12] Although employer challenges the administrative law judge's additional finding of clinical pneumoconiosis, the Board has long held that 20 C.F.R. §718.202 provides four alternative methods for establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and has declined to extend the holdings in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), outside the jurisdictions of the United States Courts of Appeals for the Third and Fourth Circuits, respectively. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*). Thus, our affirmance of the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) obviates the need to address employer's challenges to the administrative law judge's finding of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1). *Dixon*, 8 BLR at 1-345.

The administrative law judge accurately observed that Dr. Repsher did not state an opinion as to whether claimant is totally disabled due to pneumoconiosis, and she rationally discounted Dr. Renn's opinion, that pneumoconiosis played no role in claimant's disabling respiratory impairment, because Dr. Renn failed to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), which we have affirmed. *See Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318; *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355, (7th Cir. 1990). Further, as the administrative law judge stated, "[a]ll of the other doctors believed that pneumoconiosis was a contributing cause of the [c]laimant's disability." Decision and Order at 36. As the administrative law judge accurately observed, Dr. Cohen reviewed claimant's medical records and opined that coal mine dust, smoking, and Crohn's disease all significantly contribute to claimant's pulmonary disability. Claimant's Exhibit 6; Employer's Exhibit 12. We therefore affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Villain*, 312 F.3d at 335, 22 BLR at 2-589; Decision and Order at 21. Because claimant established each element of entitlement, we affirm the award of benefits. *Trent*, 11 BLR at 1-27.

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