BRB No. 10-0498 BLA

FLOYD RATLIFF	)	
	)	
Claimant- Respondent	)	
	)	
v.	)	
	)	
UNITED FUELS CORPORATION	)	
	)	DATE ISSUED: 05/17/2011
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 on Second Remand – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand – Award of Benefits (2006-BLA-05003) of Administrative Law Judge Daniel F. Solomon, 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).[1] This case, involving a living miner's subsequent claim, filed on June 21, 2004, is before the Board for the third time. In its most recent Decision and Order, the Board reversed the administrative law judge's finding that the 2004 claim was not timely filed pursuant to 20 C.F.R. §725.308(a) and remanded the case to the administrative law judge for consideration of the merits of entitlement in accordance with the instructions set forth in the Board's 2008 Decision and Order.[2] *F.R.* [*Ratliff*] *v. United Fuels, Inc.*, BRB No. 09-0247 BLA (Sept. 28, 2009)(unpub.).

On remand, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

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[1] Claimant filed his first claim for benefits on May 30, 1991, which was denied by Administrative Law Judge Edward J. Murty, Jr., on September 21, 1993, because the evidence was insufficient to establish the existence of pneumoconiosis or that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 1-29. Judge Murty denied claimant's request for modification on March 24, 1995. Director's Exhibit 1-2. There is no indication that claimant took any further action in regard to his 1991 claim. Claimant filed a second claim on June 11, 1996, which the district director denied, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibits 2-25, 121. Claimant took no further action with respect to his 1996 claim. Claimant filed a third claim on September 6, 2001, which the district director denied on April 18, 2003, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibits 3-5, 3-118. Claimant took no further action with respect to his 2001 claim. Claimant filed his current subsequent claim on June 21, 2004. Director's Exhibit 5.

[2] In the Board's 2008 Decision and Order, the panel affirmed the administrative law judge's finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d), but vacated the award of benefits and remanded the case to the administrative law judge for reconsideration of whether claimant's 2004 subsequent claim was timely. *F.R.* [*Ratliff*] *v. United Fuels, Inc.*, BRB No. 07-0424 BLA, slip op. at 4 (Feb. 29, 2008)(unpub.). The Board also vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.204(c) and instructed the administrative law judge to reconsider the medical opinion evidence on remand. *Id*. at 7.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant responds, urging the Board to affirm the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has not submitted a brief in response to employer's appeal of the award of benefits.[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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965)

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish that he has 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Upon considering whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge gave little weight to the medical opinions associated with claimant's prior claims, because the physicians did not adequately address the issue of legal pneumoconiosis, *i.e.*, whether coal mine dust exposure aggravated or contributed to claimant's impairment.[5] Decision

[3] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. As the Director, Office of Workers' Compensation Programs, asserts, the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the present claim because it was filed before January 1, 2005.

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

[5] Under 20 C.F.R. §718.201(a)(2), "legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Pursuant to 20 C.F.R. §718.201(b), "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or

and Order on Remand at 22-23. The administrative law judge also determined that the evidence submitted in connection with claimant's 2004 subsequent claim was entitled to greater weight, as the physicians addressed the amended definition of legal pneumoconiosis. *Id*.

Accordingly, the administrative law judge weighed the medical opinions of Drs. Rasmussen, Hussain, Fino and Westerfield, all of which were submitted with claimant's 2004 subsequent claim. Dr. Hussain diagnosed disabling chronic obstructive pulmonary disease (COPD) caused by emphysema due to smoking, but did not believe claimant suffers from any occupational lung disease caused by coal mine employment. Director's Exhibit 3. Although Drs. Fino and Westerfield also diagnosed a respiratory impairment, they opined that it is due to asthma, rather than coal dust exposure. Director's Exhibits 21, 25; Employer's Exhibits 1, 2. Dr. Rasmussen diagnosed legal pneumoconiosis, opining that claimant suffers from a disabling lung disease caused by his coal mine dust exposure, cigarette smoking and asthma. Director's Exhibits 14, 31; Claimant's Exhibit 1.

After setting forth the medical opinions in detail, and considering the qualifications of the physicians, the administrative law judge discredited Dr. Hussain's opinion because he did not mention claimant's coal mine employment history and did not offer an opinion as to whether claimant has legal pneumoconiosis. Decision and Order on Remand at 27. The administrative law judge further found that the opinions of Drs. Fino and Westerfield were entitled to little weight, as they did not address the irreversible component of claimant's spirometry or whether claimant's "significant history of coal dust exposure contributed to or aggravated his overall pulmonary impairment." *Id*. at 26.

In contrast, the administrative law judge found that Dr. Rasmussen's opinion was well-documented and well-reasoned. Decision and Order on Remand at 26-27. The administrative law judge noted that, unlike Drs. Fino and Westerfield, Dr. Rasmussen acknowledged the very significant, but incomplete, reversibility of the impairment in claimant's ventilatory capacity, and explained that the continued presence of an impairment indicated that there was a causal factor other than bronchial asthma. *Id*. at 27. The administrative law judge determined that Dr. Rasmussen's opinion was based on: Occupational and smoking histories; physical findings consistent with chronic obstructive lung disease, such as moderately to markedly reduced breath sounds, bilateral inspiratory coarse transient rhonchi and persistent fine inspiratory crackles, with prolonged expiratory fade and wheezing with forced expiration; symptoms including

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respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

shortness of breath, mild cough and phlegm, and wheezing in the morning with exertion; and recent, valid pulmonary function and arterial blood gas studies. *Id*. at 28. The administrative law judge thus credited Dr. Rasmussen's conclusion that claimant's coal mine dust exposure was a significant cause, or aggravating factor, in claimant's COPD, stating:

> Dr. Rasmussen submitted learned published studies to show that coal mine dust is known to cause airflow obstruction as a consequence of bronchitis and emphysema, and that bronchitis may be the consequence of asthma, cigarette smoking and coal mine dust exposure. He further explained that airway narrowing may be the consequence of bronchitis or the result of emphysema as well as the result of airway remodeling of the lung via asthma. As noted in my previous decision, I find this explanation of the function of diffusing capacity to be more rational than any other explanation offered in this record.

Id. at 27.

In addition, the administrative law judge determined that Dr. Rasmussen's opinion, that smoking and coal dust exposure caused claimant's COPD, was independent of his diagnosis of clinical pneumoconiosis, in light of Dr. Rasmussen's testimony that the diagnosis of legal pneumoconiosis is appropriate in claimant's case, even without radiographic evidence of pneumoconiosis. Decision and Order on Remand at 27. The administrative law judge also determined that, based on his finding that the evidence from the prior claims had little probative value on the issue of legal pneumoconiosis, he was not required to give Dr. Rasmussen's opinion less weight because he did not consider the negative evidence from the prior claims. *Id*. In addition, the administrative law judge found that Dr. Rasmussen's opinion was not speculative or equivocal, even though he identified three contributory causes of claimant's pulmonary impairment. *Id*. The administrative law judge, therefore, found that Dr. Rasmussen's medical opinion was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*.

Employer initially argues that the administrative law judge erred in according greater weight to the medical opinion evidence submitted in connection with claimant's 2004 subsequent claim and according little weight to the medical opinions associated with claimant's previous claims. Specifically, employer asserts that the administrative law judge failed to provide a valid basis for concluding that the previously submitted medical opinions of Drs. Vuskovich, Broudy, Wicker and Dahhan did not adequately

address whether claimant suffers from legal pneumoconiosis.[6] Employer further argues that Dr. Rasmussen's opinion, that both coal mine dust exposure and smoking caused claimant's COPD, does not constitute a well-reasoned diagnosis of legal pneumoconiosis. Employer's Brief at 6-12. Employer also contends that the administrative law judge erred in his determination that the opinions of Drs. Fino and Westerfield did not adequately explain why claimant's coal mine employment played no role in his lung disease.

Employer's allegations of error are without merit. The administrative law judge acted within his discretion in according little weight to the medical opinions associated with claimant's prior claims, because the physicians did not adequately address the issue of legal pneumoconiosis, *i.e.*, whether coal mine dust exposure aggravated or contributed to claimant's impairment. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000). The administrative law judge also rationally determined that the evidence submitted in connection with claimant's 2004 subsequent claim was entitled to greater weight, as the physicians addressed the amended definition of legal pneumoconiosis. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 306-08, 23 BLR 2-261, 2-284-87 (6th Cir. 2005); *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-22; Decision and Order on Remand at 22-23.

With respect to the administrative law judge's weighing of the newly submitted medical opinions, substantial evidence supports the administrative law judge's finding that Dr. Rasmussen based his opinion regarding the etiology of claimant's COPD on a consideration of clinical findings, the objective evidence, and claimant's history of cigarette smoking and exposure to coal dust. Director's Exhibit 33. Therefore, the administrative law judge permissibly found that Dr. Rasmussen's opinion was well-documented and well-reasoned. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-551 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149. In addition, the administrative law judge explained that Dr. Rasmussen's well-reasoned and well-documented opinion, that claimant suffers from legal pneumoconiosis, was persuasive, as Dr. Rasmussen "is an acknowledged expert in the field of pulmonary impairments of coal miners" and his "curriculum vitae establishes his extensive experience in pulmonary

[6] Employer contends that the administrative law judge erred in failing to specifically explain his reason for discounting Dr. Vuskovich's September 1991 opinion. Contrary to employer's assertion, the administrative law judge discussed Dr. Vuskovich's 1991 report and included a reference to it in his finding that the older reports were entitled to little weight because the physicians did not address the amended definition of legal pneumoconiosis. Decision and Order on Remand at 11, 22.

medicine and in the specific area of coal workers' pneumoconiosis."[7] *See Martin*, 400 F.3d at 306-08, 23 BLR at 2-284-87; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order on Remand at 22. Thus, the administrative law judge permissibly found that Dr. Rasmussen's opinion is legally sufficient to establish the existence of legal pneumoconiosis, because Dr. Rasmussen identified coal mine dust exposure as "a significant or substantial cause or aggravating factor" in claimant's COPD. Director's Exhibit 14; *see* 20 C.F.R. §718.201(a)(2),(b); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121.

Regarding the opinions of Drs. Fino and Westerfield, the administrative law judge acted within his discretion in finding that they were entitled to little weight, based upon their view, that they would expect to see x-ray evidence of fibrosis if claimant's coal mine dust exposure caused an impairment. The administrative law judge correctly noted that, although a fibrotic reaction of lung tissue caused by coal dust exposure is required to establish the existence of clinical pneumoconiosis, x-ray evidence of fibrosis is not necessary for a finding of legal pneumoconiosis under 20 C.F.R. §718.201(a)(2). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120; Decision and Order on Remand at 25-26. The administrative law judge rationally found that the opinions of Drs. Fino and Westerfield were not as well-reasoned as Dr. Rasmussen's opinion, because they did not directly address the concept of aggravation of COPD by coal dust that is set forth in 20 C.F.R. §718.201(b). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120; Decision and Order on Remand at 26.

Because determinations regarding the credibility of the medical experts are committed to the discretion of the administrative law judge, we affirm his finding that the opinion of Dr. Rasmussen is reasoned and documented and sufficient to establish that claimant's COPD is due, in part, to his coal dust exposure. *See Napier*, 301 F.3d at 713, 22 BLR at 2-553; *Clark*, 12 BLR at 1-151; Decision and Order on Remand at 28. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant satisfied his burden of proving the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Martin*, 400 F.3d at 306-08, 23 BLR at 2-284-87; *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-22.

[7] In addition to indicating that Dr. Rasmussen is Board-certified in Internal Medicine, his curriculum vitae includes information detailing his appointments to numerous national and state boards and committees dealing with pneumoconiosis and respiratory disease, testimony before the United States Senate and House of Representatives on the issue of pneumoconiosis, and numerous publications dealing with pneumoconiosis and respiratory diseases. Director's Exhibit 31.

In determining that claimant established that his total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge credited Dr. Rasmussen's opinion, and discredited the opinions of Drs. Fino and Westerfield, for the same reasons that he set forth in his consideration of whether the medical opinion evidence supported a finding of legal pneumoconiosis. Employer raises the same challenges to the administrative law judge's disability causation finding that it raised with respect to his finding of legal pneumoconiosis. Because we have rejected those arguments, and the administrative law judge permissibly discounted the disability causation opinions of Drs. Fino and Westerfield on the ground that the physicians did not diagnose legal pneumoconiosis, we affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 825-26, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order on Remand at 29.

In light of our affirmance of the administrative law judge's findings, that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Second Remand – Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge