BRB No. 10-0502 BLA

GEORGE W. FLENNIKEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CYPRUS EMERALD RESOURCES CORPORATION	)	
	)	
	)	DATE ISSUED: 05/19/2011
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (08-BLA-5029) of Administrative Law Judge Daniel L. Leland rendered on a claim filed on November 7, 2006, 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 fourteen and one-half years of coal mine employment, based on the parties' stipulation and his review of the evidence.[1] The administrative law judge, however, found that the evidence did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, he denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant did not establish the existence of legal pneumoconiosis at Section 718.202(a)(4).[2] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge erred in weighing the medical opinion evidence regarding legal pneumoconiosis.[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

[1] As claimant's coal mine employment was in Pennsylvania, this cases arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

[2] The administrative law judge's finding of fourteen and one-half years of coal mine employment, as well as his findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that the medical opinion evidence did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4), are not challenged on appeal. We therefore affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The Director, Office of Workers' Compensation Programs (the Director), states that the amendments to the Act contained in Section 1556 of Public Law No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), do not affect this case, because claimant worked fewer than fifteen years in coal mine employment. The amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), reinstated the rebuttable presumption of total disability due to pneumoconiosis for miners with at least fifteen years of qualifying coal mine employment who filed their claims after January 1, 2005, and whose claims were pending on or after March 23, 2010. We agree with the Director that the rebuttable presumption is not available in this case, as claimant does not challenge the administrative law judge's finding of fourteen and one-half years of coal mine employment.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Celko, Parker, Rasmussen, Altmeyer, and Fino on whether claimant has legal pneumoconiosis.[4] All the physicians agree that claimant has disabling chronic obstructive pulmonary disease (COPD). They disagree on the issue of whether claimant's COPD was caused by coal mine dust, smoking, asthma, or a combination of all three. Drs. Celko, Parker, and Rasmussen opined that claimant's COPD is due to both smoking and coal mine dust exposure, with Drs. Celko and Rasmussen identifying asthma as an additional cause of the COPD.[5] Director's Exhibit 12; Claimant's Exhibits

[4] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[5] Because the administrative law judge focused on the physicians' views on whether claimant's chronic obstructive pulmonary disease (COPD) is due entirely to asthma, or is instead COPD with an asthmatic component, we will set forth the physicians' opinions on that issue. Noting that a pulmonary function study showed that claimant's COPD partially reverses after he takes a bronchodilator medication, Dr. Celko diagnosed claimant with "COPD/asthma." Director's Exhibit 12 at 4; Employer's Exhibit 6 at 26. In contrast, Dr. Rasmussen initially found insufficient evidence to diagnose asthma. Claimant's Exhibit 3 at 5. Specifically, he noted that a pulmonary function study he administered, and two others he reviewed, showed intermittent, and only partial, reversibility of claimant's COPD. Claimant's Exhibit 3 at 5. Noting that partial reversibility occurs in any COPD, and that claimant has no history of asthma, Dr. Rasmussen stated that he could not diagnose asthma. *Id*. Later, however, after reviewing a December 2006 pulmonary function study that he interpreted as showing more significant, though not complete reversibility, Dr. Rasmussen testified that he could not exclude asthma as a contributor to claimant's COPD. Claimant's Exhibit 7 at 13, 17. Dr. Rasmussen explained that the December 2006 pulmonary function study did not "prove" asthma, because partial reversibility "is consistent with any type of COPD," but he

2, 3, 7; Employer's Exhibit 6. In contrast, Drs. Altmeyer and Fino opined that claimant's COPD is due to asthma unrelated to his coal mine employment.[6] Director's Exhibit 15; Employer's Exhibits 1, 9, 11. Dr. Altmeyer added that smoking may also be a cause of claimant's COPD. As part of their reasoning for excluding pneumoconiosis, Drs. Altmeyer and Fino noted that claimant left coal mining in 1991, and they opined that it would be very unusual for him to have developed symptoms due to coal mine dust exposure over a decade after he stopped mining. Employer's Exhibit 1 at 6-7; Employer's Exhibit 9 at 30, 34; Employer's Exhibit 11 at 21-22, 25.

The administrative law judge discredited the opinions of Drs. Celko and Parker, because he found that they gave no reason for attributing claimant's COPD partly to coal mine dust exposure. Turning to Dr. Rasmussen's opinion, the administrative law judge found that Dr. Rasmussen's view that "reversibility is not diagnostic of asthma" was outweighed by the opinions of Drs. Altmeyer and Fino that reversibility "supports a diagnosis of asthma rather than legal pneumoconiosis. . . ." Decision and Order at 9. The administrative law judge found the opinions of Drs. Altmeyer and Fino to be well-reasoned and entitled to great weight. In so finding, he acknowledged that both doctors cited the onset of claimant's COPD after he quit coal mining as a reason for concluding that he does not have pneumoconiosis, when Section 718.201(c) recognizes that pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). The administrative law judge, however, found that the opinions of Drs. Altmeyer and Fino were not inconsistent with Section 718.201(c), because the doctors did not assert that pneumoconiosis can never be latent and progressive, only that it would be unusual for claimant to have developed legal pneumoconiosis years after he quit coal mining. Decision and Order at 9. Noting that Dr. Rasmussen "was unable to exclude asthma as a cause" of claimant's COPD, the administrative law judge found that claimant did not establish legal pneumoconiosis. *Id*.

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explained that the marked improvement with bronchodilator led him to list asthma as a possible cause of claimant's "multifactorial" COPD. *Id*. at 29.

[6] Dr. Altmeyer opined that, because claimant's COPD is significantly reversible, it is "naturally occurring asthma." Employer's Exhibit 1 at 6; Employer's Exhibit 9 at 28. Dr. Fino initially concluded that claimant has severe COPD that does not respond to a bronchodilator, and he opined that neither claimant's smoking nor his coal mine employment seemed likely as causes. Director's Exhibit 15 at 9. Later, having reviewed additional pulmonary function studies, Dr. Fino testified that the significant, partial reversibility of claimant's COPD detected on those studies pointed to a non-coal mine employment condition, such as asthma. Employer's Exhibit 11 at 25-28. Both Drs. Altmeyer and Fino opined that coal mine dust-related COPD does not reverse with a bronchodilator. Employer's Exhibit 1 at 20; Employer's Exhibit 11 at 20.

Claimant and the Director contend that substantial evidence does not support the administrative law judge's reason for discrediting the opinions of Drs. Celko and Parker that claimant has legal pneumoconiosis. Claimant's Brief at 2; Director's Brief at 2. This contention has merit. The administrative law judge found that neither doctor explained his opinion, leading the administrative law judge to suspect that each attributed claimant's COPD in part to coal mine dust exposure solely because claimant worked as a coal miner. Contrary to the administrative law judge's finding, the record reflects that, in addition to considering claimant's examination and objective test results, as well as his smoking, coal mine employment, and medical histories, Drs. Celko and Parker explained why they related claimant's COPD, in part, to his coal mine dust exposure.[7] Therefore, the administrative law judge erred in discrediting the opinions of Drs. Celko and Parker on the basis that they set forth no rationale for determining that claimant's COPD is due partly to coal mine dust exposure. *See* 33 U.S.C. §921(b)(3); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Claimant and the Director further assert that the administrative law judge mischaracterized Dr. Rasmussen's opinion on the significance of impairment reversibility, with respect to whether claimant has legal pneumoconiosis. We agree. When weighing the opinions, the administrative law judge characterized Dr. Rasmussen's opinion as one that reversibility is not diagnostic of asthma, and he found it outweighed by the opposing views of Drs. Altmeyer and Fino. Contrary to the administrative law judge's characterization, Dr. Rasmussen did not state that reversibility is not diagnostic of asthma; he stated that complete reversibility, if present, would confirm that claimant has asthma. Claimant's Exhibit 7 at 30. Dr. Rasmussen explained that, in view of the partial, but significant reversibility he observed on the December 2006 pulmonary function study, he could not exclude asthma, and he therefore included it as a possible cause of claimant's COPD, along with coal mine dust exposure and smoking. Claimant's Exhibit

[7] Dr. Celko explained that both claimant's coal mine employment history and his fifteen pack-years of smoking contributed about equally, because both exposures were significant, and about equal in duration. Employer's Exhibit 6 at 15, 17, 36. He stated further that, while it may be uncommon for pneumoconiosis to progress, it can do so, and in this case, the delayed onset of claimant's respiratory symptoms is consistent with the notion that pneumoconiosis may be latent and progressive. *Id*. at 32-33, 36. Dr. Parker explained that claimant's pulmonary function study findings of severe obstruction and responsiveness to a bronchodilator "are consistent with lung injury from coal[]mine dust and tobacco." Claimant's Exhibit 2 at 2. Additionally, Dr. Parker reviewed the medical literature regarding coal mine dust and obstruction, and discussed how four different types of epidemiological studies, and a laboratory study of the toxicologic mechanisms of coal mine dust, supported a causal link between claimant's clinical findings and his coal mine dust exposure. Claimant's Exhibit 2 at 2-3.

7 at 13, 17, 30. Thus, the administrative law judge's analysis does not coincide with the substance of Dr. Rasmussen's opinion. *See Tackett*, 7 BLR at 1-706.

Moreover, as the Director asserts, the administrative law judge did not resolve the dispute between Dr. Rasmussen's opinion that COPD related to coal mine dust can show partial reversibility with a bronchodilator, and the opinions of Drs. Altmeyer and Fino, that COPD reversibility is inconsistent with a coal mine dust-related disease.[8] Therefore, the administrative law judge's decision does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In view of the foregoing errors, we must vacate the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis under Section 718.202(a)(4), and remand this case for him to reconsider the medical opinions on that issue. In reconsidering the medical opinions, on remand, the administrative law judge must take into account the physicians' qualifications, the explanations of their medical opinions, the documentation underlying their judgments, the sophistication and bases of their diagnoses, and he must explain his findings. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Wojtowicz*, 12 BLR at 1-165. Additionally, we instruct the administrative law judge, on remand, that claimant need not prove that coal dust exposure was the sole cause of his COPD, in order to establish legal pneumoconiosis.[9] *See* 20 C.F.R. §718.201(b). The Director contends that the administrative law judge should also reconsider the credibility of the opinions of Drs. Altmeyer and Fino in light of Section 718.201(c), because the physicians used the delayed onset of claimant's COPD, after he left coal mining, as a reason to exclude coal mine employment as a cause.[10] Director's Brief at 3. The administrative law judge, on

[8] As noted *supra*, n.7., Dr. Parker also opined that claimant's reversible obstructive impairment is consistent with lung injury due, in part, to coal mine dust exposure. Claimant's Exhibit 2 at 2.

[9] We include the above instruction because the administrative law judge relied on the fact that "Dr. Rasmussen was unable to exclude asthma *as a cause* of the miner's obstructive pulmonary impairment," as a reason for finding that claimant did not establish legal pneumoconiosis. Decision and Order at 9 (emphasis added); *cf.* 20 C.F.R. §718.201(b)(defining legal pneumoconiosis to include lung disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment").

[10] The Director argues that the doctors' opinions, that it would be unusual for claimant to have developed symptoms due to coal mine dust over ten years after he left mining, are not persuasive in view of the legal definition of pneumoconiosis because, in

remand, should address the Director's contention regarding the opinions of Drs. Altmeyer and Fino, when he analyzes the reasoning of the medical opinions. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10, 22 BLR 2-467, 2-478-79 (3d Cir. 2002). If the administrative law judge finds that claimant has established the existence of legal pneumoconiosis, he must then determine whether claimant has established that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2),(c).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion

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

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effect, the doctors exclude from coal-dust-induced disease an impairment that arises after a miner leaves coal mine employment. Director's Brief at 2-3; *citing Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).