BRB No. 06-0136 BLA

HIRAM J. ACORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 11/30/2006
	)	
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 Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington and Lee University School of Law Legal Clinic), Lexington, Virginia, for claimant.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-6585) of Associate Chief Administrative Law Judge Thomas M. Burke on a subsequent claim[1] 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that claimant worked in qualifying coal mine employment for seventeen years and ten months. The administrative law judge found that the newly submitted evidence demonstrated that claimant had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and that, therefore, claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309. Addressing the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to Section 718.204. Accordingly, benefits were awarded as of September 1, 2001, the month in which the claim was filed.

On appeal, employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), and 5 U.S.C. §556(d), 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), which requires "reasoned decisionmaking." In support of this contention, employer asserts that the administrative law judge failed to resolve the conflict in the medical opinions and to provide an adequate explanation for preferring the opinions of Drs. Rasmussen, Cohen, and Doyle, who opined that claimant suffers from pneumoconiosis that renders him totally disabled from performing his last coal mine employment, over the contrary opinions of Drs. Branscomb and Zaldivar. In addition, employer argues that, in finding total respiratory disability established, the administrative law judge erred in finding a material change in conditions under Section 725.309 and in finding that claimant had affirmatively established entitlement to benefits.[2] Claimant has

[1] Claimant filed his first application for benefits on June 2, 1993; this claim was denied on November 19, 1993 and administratively closed thereafter. Director's Exhibit 1. Claimant's second application, filed on March 16, 2000, was finally denied by the district director on August 11, 2000, and claimant did not appeal this decision. Director's Exhibit 2. Claimant filed a third application, the instant claim, on September 26, 2001. Director's Exhibit 4.

[2] Because claimant filed the pending application for benefits on September 26, 2001, which is after January 19, 2001, the effective date for application of the newly amended regulations regarding "subsequent claims," the regulation set forth at 20 C.F.R. §725.309 (2002) is applicable and the instant claim is properly construed as a "subsequent claim" rather than a "duplicate claim." Hence, it was claimant's burden to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final rather than "a material

filed a response brief, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, (the Director), as party-in-interest, has filed a response letter confined to one issue: whether the administrative law judge properly discounted the opinions of Drs. Branscomb and Zaldivar due to their reliance on evidence outside the record pursuant to 20 C.F.R. §725.414(3)(i). The Director urges the Board to reject employer's allegation of error.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Challenging the administrative law judge's weighing of the medical opinions on the issue of total disability under Section 718.204(b)(2)(iv), employer argues that the administrative law judge improperly discounted the opinions of Drs. Branscomb and Zaldivar because they relied on evidence outside the record. Employer asserts that the administrative law judge's application of the revised regulations was error because they are neither reasonable nor authorized by the Black Lung Benefits Act or the Longshore Act insofar as they adopt rules that are more restrictive than the Federal Rules of Evidence.[4] Employer's Brief in Support of Petition for Review at 16. The Director responds, asserting that employer's argument is "clearly wrong." Brief for Director at 1.

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change in conditions." 20 C.F.R. §§725.309 (2000), 725.309 (2002); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995) (material change in conditions standard for duplicate claims); Decision and Order at 3.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations regarding the length of coal mine employment and the onset date of total disability. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2, 5, 15.

[4] Under the revised Part 725 regulations, the scope of a physician's testimony or opinion as to the miner's condition is limited to medical evidence that is admissible. *See Dempsey v. Sewell Coal Co.*, 23 BLR at 1-47 (2004)(*en banc*). Section 725.457(d) states, "A physician whose testimony is permitted under this section may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence relevant to the miner's condition that is not admissible." 20 C.F.R. §725.457(d). Section 725.458 provides, "The testimony of any physician which is taken by deposition shall be subject to the limitations on the scope of the testimony contained in §725.457(d)." 20 C.F.R. §725.458; *see Dempsey*, 23 BLR at 1-47.

The Director's position has merit. In *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the court held that there was a rational basis for limiting evidence and noted, in particular, the broad authority the statute confers upon the Secretary to issue regulations to establish the rights to benefits. 30 U.S.C. §932(b). *Id*. Similarly, the Director points out that Congress empowered the Secretary to depart from specific requirements of the Longshore Act in 30 U.S.C. §932(a). *Director, OWCP v. Nat'l Mines Corp.*, 554 F.2d 1267, 1273-74 (4th Cir. 1977). Letter from Director at 2. Furthermore, contrary to the implication of employer's argument, the revised rules do not set inflexible limits. *See Nat'l Mining Ass'n*, 292 F.3d at 873-4. The rules give administrative law judges discretion to consider additional evidence when a party establishes good cause for its admission. 20 C.F.R. §§725.414, 725.456(b)(1). The revised regulations limiting the submission of evidence reflect both a reasonable and proper exercise of the Secretary's authority under the Act. *Nat'l Mining Ass'n.*, 292 F.3d at 873-74; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*).

In this case, the administrative law judge found that "Drs. Branscomb and Zaldivar relied, at least in part, on pulmonary function studies which were not in the record when making their determinations," and that Dr. Branscomb's assessment was also based in part on exercise arterial blood gas studies which were not in the record and that, therefore, their opinions assessing whether claimant has a totally disabling respiratory impairment were not well documented. Decision and Order at 8. Accordingly, the administrative law judge gave their opinions less weight. The administrative law judge's determination reflects a proper application of the revised regulations. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting).[5] Furthermore, as the administrative law judge correctly observed, the opinions of Drs. Branscomb and Zaldivar that claimant could perform his usual coal mine employment are significantly undermined by the condition they included: that he undergo a comprehensive pulmonary treatment program. *See* 20 C.F.R. §§725.457, 725.458; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984); Decision and Order at 8.

Employer argues that, in finding that the newly submitted evidence demonstrated total respiratory disability, the administrative law judge failed to weigh all of the contrary evidence, like and unlike, together when concluding that claimant established total respiratory disability pursuant to Section 718.204(b). Employer contends, therefore, that because the administrative law judge erred in finding that claimant established total respiratory disability, he also erred in finding that claimant demonstrated that one of the

[5] Employer does not argue that those studies should have been admitted into the record but were improperly excluded.

applicable conditions of entitlement had changed since the date upon which the order denying the prior claim pursuant to Section 725.309 was issued.

We disagree. In assessing whether claimant demonstrated total respiratory disability, the administrative law judge initially evaluated the evidence relevant to each subsection set forth in Section 718.204(b)(2)(i)-(iv).[6] Pursuant to Section 718.204(b)(2)(i), the administrative law judge found that because three out of five newly submitted pulmonary function studies yielded qualifying values, the preponderance of the pulmonary function study evidence demonstrated that claimant was totally disabled under this subsection. Decision and Order at 5. Pursuant to Sections 718.204(b)(2)(ii) and (iii), the administrative law judge found that claimant failed to demonstrate total respiratory disability because the preponderance of the newly submitted arterial blood gas studies were non-qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 4-5. Pursuant to Section 718.204(b)(2)(iv), the administrative law judge relied on the opinions of Drs. Cohen, Rasmussen, and Doyle, who opined that claimant was unable to perform his last coal mine employment from a respiratory standpoint, because these physicians' opinions were better supported by the evidence of record, including consideration of claimant's reduced pulmonary capacity reflected in the qualifying pulmonary function studies and his last coal mine employment which was heavy manual labor. Decision and Order at 8. Thereafter, the administrative law judge weighed together all of the newly submitted evidence relevant to Section 718.204(b)(2)(i)-(iv) and, within a rational exercise of his discretion, determined that the qualifying pulmonary function studies and "the well documented and well reasoned medical opinions" of Drs. Cohen, Rasmussen, and Doyle were more probative than the contrary evidence, and that, therefore, claimant affirmatively established that his respiratory or pulmonary impairment precludes him from performing his last coal mine work. Decision and Order at 8. Contrary to employer's contention, therefore, the administrative law judge rendered a comparative assessment of the relevant evidence of total respiratory disability before determining that claimant had affirmatively established this element. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Because the administrative law

[6] In his total disability analysis, the administrative law judge mistakenly referred to the total disability subsections set forth in Sections 718.204(c)(1)-(4) (2000), which are provisions that apply to claims filed prior to January 19, 2001. Decision and Order at 5-8. Because the instant claim was filed on September 26, 2001, after January 19, 2001, the newly amended regulations as set forth in Sections 718.204(b)(2)(i)-(iv) apply to this case. Nevertheless, the administrative law judge's error is harmless since the regulations at issue do not reflect a change in substance. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

judge properly determined that claimant had established total respiratory disability and therefore, that an applicable condition of entitlement had changed since the date of the prior denial, Section 725.309(d) did not bar consideration of entitlement in this subsequent claim.

Next, employer challenges the administrative law judge's findings on the merits of the claim and his weighing of the conflicting medical opinions regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Relying on *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), and *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), which stand for the proposition that the trier-of-fact must act as a "gatekeeper" not only to ensure that scientific evidence relied upon is valid and reliable, but also to ensure that decisions are based on valid scientific reasons, employer argues that the administrative law judge abdicated his duty to serve as a "gatekeeper" by crediting the medical opinions of Drs. Cohen, Rasmussen and Doyle. Employer has failed, however, to support its contention with any analysis of the evidence: either of the individual medical opinions or the reasons provided by the administrative law judge in crediting those opinions. Accordingly, we must reject employer's allegation of error. Employer's Brief in Support of Petition for Review at 12-14; *Newport News Shipbuilding and Dry Dock v. Howard*, 904 F.2d 206, 208 n.2 (4th Cir. 1990); *see Jarrell*, 187 F.3d at 389, 21 BLR at 2-648; *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Employer argues that there is no valid reason for the administrative law judge to find the opinions of Drs. Rasmussen, Cohen or Doyle "reliable, probative, and substantial" because the facts in this case are similar to those found in *Jarrell* since neither Dr. Rasmussen nor Dr. Doyle relied on sound science to render an opinion and Dr. Cohen failed to explain how his medical studies supported his conclusion. Employer argues that the administrative law judge's reliance on physicians who opined that coal mine dust exposure could have caused claimant's underlying obstructive lung disease when it was equally possible that cigarette smoking or asthma caused the lung disease, contravenes the holdings in *Jarrell* and *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999) because these cases require more certainty than the doctors in this case provided.

The circumstances in *Jarrell* differ substantially from those before us. In *Jarrell*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, found that Dr. Rasmussen's opinion, that "it is *possible* that [Jarrell's] death could have occurred as a consequence of his pneumonia *superimposed* upon his … occupational pneumoconiosis," did not constitute " 'reliable, probative, and substantial' evidence on which the administrative law judge could base a black lung benefits award"

because Dr. Rasmussen's opinion was entirely speculative, did not reflect any degree of medical certainty, and was not related to the record evidence. *Jarrell*, 187 F.3d at 390, 21 BLR at 2-649-651 [emphasis in original], *citing* APA, 5 U.S.C. §556(d). Although employer insists that the opinions of Drs. Cohen, Rasmussen and Doyle are speculative and unsupported by the record, employer does not provide any quotation from any of these opinions to support its assertion, it does not even cite any part of any of these opinions. Contrary to employer's argument, the opinions of Drs. Rasmussen, Cohen, and Doyle are supported by evidence. *See Mays*, 176 F.3d 753, 21 BLR 2-587 (conditional medical opinion deemed sufficient to support award because the relationship between pneumoconiosis and death was based on actual evidence not speculation).

Employer further asserts, assuming *arguendo* that the opinions of Drs. Rasmussen, Doyle, and Cohen were reasoned and documented, the administrative law judge erred in failing to explain why their opinions outweighed those of Drs. Branscomb and Zaldivar. As the administrative law judge provided a thorough explanation clearly delineating the reasons why the opinions of Drs. Rasmussen, Cohen, and Doyle were more persuasive and convincing evidence than those of Drs. Branscomb and Zaldivar, we reject employer's argument.

In assessing the probative value of the medical opinions, the administrative law judge properly found that while the clinical diagnoses of pneumoconiosis rendered by Drs. Rasmussen and Cohen were not supported by the x-ray evidence, the specific legal diagnoses of pneumoconiosis were adequately supported by physical examinations and objective tests. The administrative law judge credited the opinion of Dr. Rasmussen, who opined that coal dust exposure caused, in part, claimant's chronic obstructive pulmonary disease and significantly contributed to claimant's loss of lung function, because the doctor's opinion was based on claimant's coal mine employment history, cigarette smoking history, physical examination, and diagnostic testing revealing a severe partially reversible obstructive impairment. *See Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR at 1-155; Decision and Order at 12. The administrative law judge found further that Dr. Cohen not only provided a clear rationale for his exclusion of asthma as a cause of claimant's impairment, but also emphasized that his pneumoconiosis diagnosis would remain the same even if the majority of the x-ray evidence were negative. More specifically, the administrative law judge determined that Dr. Cohen rejected asthma, as diagnosed by Drs. Branscomb and Zaldivar, as the cause of claimant's pulmonary condition due to its minimal reversibility and the failure of claimant's post-bronchodilator FEV_1 value to improve beyond a moderate impairment level, let alone a normal or near-normal level. Further, the administrative law judge found that Dr. Cohen, who provided two comprehensive reports dated May 10, 2004 and December 16, 2004, observed: that claimant has no episodic severe bronchospasm which would be indicative of asthma; his symptoms of cough, sputum production and wheezing are not, in and of themselves, diagnostic of asthma; and his normal diffusing capacity results were not

necessarily inconsistent with a diagnosis of pneumoconiosis. Decision and Order at 13; Claimant's Exhibits 3, 8. The administrative law judge also took particular note of Dr. Doyle, who agreed with Dr. Cohen that asthma did not cause claimant's pulmonary condition, because Dr. Doyle's treating physician status made him familiar with claimant's history and the nature of claimant's disease over a period of time. *See* 20 C.F.R. §718.104(d); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997) (treating physicians' opinions deserve "especial" consideration); Decision and Order at 13; Director's Exhibit 12; Claimant's Exhibits 3, 7, 8. Because the administrative law judge's crediting of the opinions of Drs. Rasmussen, Cohen, and Doyle is rational, contains no reversible error, and is supported by substantial evidence, we reject employer's arguments. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997) (administrative law judge does not have to accept opinion or theory of any given medical witness); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1190, 7 BLR 2-202, 2-208 (4th Cir. 1985); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

Finally, employer contends that the administrative law judge impermissibly shifted the burden of proof to employer to prove that coal mine employment did not cause claimant's respiratory impairment when he discounted the opinions of Drs. Branscomb and Zaldivar based on their failure to rule out coal dust exposure as a causative factor in claimant's pulmonary impairment. Employer asserts that Drs. Branscomb and Zaldivar each explained why claimant's pulmonary condition was indicative of cigarette smoking and asthma and, therefore, their opinions constitute probative evidence.

After critically analyzing all of the conflicting medical opinions of record and the supporting diagnostic studies, the administrative law judge determined that the opinions of Drs. Zaldivar and Branscomb excluding coal dust exposure as a cause of claimant's pulmonary impairment were not as well reasoned as the contrary opinions, both because they did not account for claimant's significant employment history and their diagnosis of asthma was less persuasive than the diagnosis of legal pneumoconiosis. The administrative law judge's examination of the opinions of Drs. Branscomb and Zaldivar not only revealed the physicians' attempt to attribute the non-reversible component of claimant's pulmonary function to cigarette-smoke induced emphysema, but also revealed their failure to adequately explain their exclusion of claimant's significant coal dust exposure history as a potential cause. A similar finding was upheld by the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213, 22 BLR 2-162, 2-179 (4th Cir. 2000): there was sufficient evidence on the record to support the administrative law judge's determination that Dr. Zaldivar "failed to consider pneumoconiosis as an additional cause of *Compton's* pulmonary problems".

In the case at bar, both Dr. Zaldivar and Dr. Branscomb offered the kind of conclusory opinion which the Fourth Circuit criticized in *Compton*. The administrative

law judge also properly criticized the causation opinions of Drs. Zaldivar and Branscomb for their diagnosis of asthma. The administrative law judge recognized: that Dr. Branscomb's asthma diagnosis was based on claimant's "characteristics, patterns, treatment responses, and timing of respiratory findings"; and that Dr. Zaldivar's asthma diagnosis was based on claimant's normal diffusing capacity illustrating no tissue destruction. Nevertheless, the administrative law judge found more persuasive Dr. Cohen's explanation for rejecting asthma as the cause of claimant's pulmonary condition and supporting citation to a clinical study: claimant's condition was minimally reversible whereas asthma is often fully reversible. Decision and Order at 13. Hence, the administrative law judge concluded that the diagnoses of Drs. Branscomb and Zaldivar simply were not as well documented nor as well reasoned as the contrary opinions. This was rational. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002) (it is for the administrative law judge as factfinder to decide whether a physician's report is sufficiently reasoned because such a determination is essentially a credibility matter); *Mays*, 176 F.3d at 762 n.10, 21 BLR at 2-603 n.10; Decision and Order at 12; Director's Exhibit 29; Employer's Exhibit 4.

Based on the foregoing, therefore, we hold that the administrative law judge conducted a full and comparative weighing of all relevant evidence; he reasonably determined that the newly submitted evidence was sufficient to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final; and he rationally found that the evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis pursuant to Section 718.204. *See Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR 1-149; *Carpeta*, 7 BLR 1-145, 1-147. Accordingly, because we affirm the administrative law judge's finding that claimant satisfied his burden of establishing that he suffers from coal workers' pneumoconiosis and is totally disabled due to pneumoconiosis, we affirm the administrative law judge's determination that claimant is entitled to benefits in this case. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge